Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD KEITH ALLRIDGE,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner's constitutional right to a jury instruction on a non-capital offense raised by the evidence, upheld by this Court in *Beck v. Alabama*, 447 U.S. 625 (1980), and *Schad v. Arizona*, 501 U.S. 624 (1991), violated, when the jury was instructed only on capital murder and a crime of which conviction would have been "illogical," considering the record as a whole?

2. Was Petitioner's constitutional right to have the prosecution produce all evidence exculpatory as to guilt or mitigating as to punishment, affirmed by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963), violated, when the State knowingly and deliberately suppressed the narrative confession of Petitioner's accomplice, which tended to corroborate his contention that the fatal shot was an involuntary, startled reflex at the unexpected discharge of the accomplice's firearm?

3. Was Petitioner's constitutional right to respond, at the punishment phase of his capital murder trial, to the State's showing of his future dangerousness, recently reiterated by this Court in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), violated, when the trial judge refused to allow him to present evidence that, as a matter of fact and State policy (but not statutory law), the alternative to a death sentence would be life without parole?

4. Was Petitioner unconstitutionally prevented, despite this Court's holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989), from introducing mitigating evidence at the sentencing phase of his trial, by virtue of the fact that any persuasive force of such evidence would tend to increase the likelihood of an affirmative answer to the Second Special Issue, and therefore of a capital sentence?

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Petitioner Ronald Keith Allridge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the denial of a writ of habeas corpus by the United States District Court for the Northern District of Texas.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, *infra*, App. 1a-19a, is reported at 41 F.3d 213 (5th Cir. 1994). The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, *infra*, App. 20a-43a, is unreported.

Petitioner's State court conviction was reviewed and affirmed in a published decision of the Texas Court of Criminal Appeals, *Allridge v. State*, 762 S.W.2d 146 (1988). This Court denied certiorari. *Allridge v. Texas*, 489 U.S. 1040 (1989). The habeas corpus proceedings before the State trial court in Texas are unreported; the affirmance by the Court of Criminal Appeals of the denial of the writ is reported at 820 S.W.2d 152 (1991). No petition for certiorari to review that decision was filed in this Court.

JURISDICTION

The Fifth Circuit entered its judgment on December 15, 1994. No petition for reconsideration was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The provisions of Texas law in effect at the time of Petitioner's trial, regarding the Special Issues to be put to the jurors and answered by them unanimously before a sentence of death could be passed, Texas Code of Criminal Procedure art. 37.071(b), are set out in the Appendix, App. 44a. Also attached are the Texas statutory definitions of the crimes of "capital murder" and "murder." Texas Penal Code, § 19; App. 44a.[1]

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[1] "Felony murder" is the crime defined by §19.02(b)(3).

Relevant provisions of the Federal habeas corpus statute, 28 U.S.C. § 2254, are attached at App. 46a-48a.

STATEMENT

Early in the morning of March 25, 1985, Petitioner Ronald Keith Allridge shot and killed Carla McMillen Otto, at a Whataburger Restaurant in Fort Worth, Texas. Petitioner and three accomplices were conducting an armed robbery of the establishment. Ms. Otto was a customer. She was killed by a shotgun blast at very close range, and died instantly. Petitioner was arrested later that night, with the other robbers, and confessed to the killing.

Petitioner's guilt in causing the death of Carla McMillen Otto is not in doubt, and is not an issue in the instant Petition. What is in issue is the nature and definition of the crime that Petitioner committed, as well as the fairness and constitutionality of the procedures that led to his sentence of death, given what the jury was and was not permitted to hear.

The Crimes of March 24-25, 1985

During the evening of March 24-25, 1985, James and Ronald Allridge, who are brothers, and Clarence and Milton Ray Jarmon, also brothers, embarked on a spree of armed robberies in Fort Worth, Texas. Their targets were restaurants, and especially fast-food establishments, which were more likely to be open late at night. In each of their holdups, they used the same *modus operandi*: one of the foursome would remain in the car as getaway driver, one would announce the robbery and oversee the entire operation, a third would go behind the counter to take possession of the contents of the cash register, and the fourth would rob the customers, usually by flinging a bag or other receptacle at someone sitting near the door, and ordering him or her to fill it with property from other victims who happened to be present. The three who entered the establishment would be armed, and would conceal their faces with ski masks.

Sometime shortly after midnight, the four drove to the Whataburger restaurant on Sycamore School Road in Fort Worth. They agreed in the car upon who would play which role: James Allridge stayed behind as the driver, Clarence Jarmon, armed with a .22 caliber pistol, was to be the overseer, Milton Ray Jarmon, carrying a .25 caliber handgun, was to rifle the cash register, and Petitioner Ronald Keith Allridge, who carried a shotgun, was to collect valuables from the patrons of the restaurant.

There is really no dispute as to the sequence of events, from the time the robbers' car entered the Whataburger parking lot until the fatal shot was fired. As the men began to don their ski masks, they saw a customer exit the restaurant, and then turn around and reenter. Assuming they had been spotted, they decided to act quickly to carry out their plan. The two Jarmons and Petitioner reached the door of the building just as the customer, Bobby D. Haney, was exiting again. They shoved Haney in front of them, and with him effectively as hostage, entered the Whataburger.

As the four came in the door, Clarence Jarmon fired his .22, shattering the glass of the door opposite the one they entered. He announced the robbery. Only two tables were occupied: one, by Carla McMillen Otto and two acquaintances, next to the door through which the robbers had come, and the other, by some teenagers, next to the opposite door whose glass had just been broken. In addition, there were two restaurant employees working behind the counter, one employee mopping the floor of the public area, and some people in a car receiving an order at the drive-through window.

Petitioner Allridge spotted Ms. Otto and her companions, threw a black gym bag at her, and when it fell to the floor said, "Fill it up, bitch." He held the shotgun on her, as she put up her hands in apparent shock and surrender.

At the same moment, Milton Ray Jarmon held his .25 in his hand as he vaulted the counter. As Jarmon landed on the kitchen side of the counter, he slipped and fell, and as he fell, his pistol discharged. An instant later, Petitioner Allridge pulled the trigger of the shotgun, killing Carla McMillen Otto at point-blank range.

At trial, the following facts were established beyond any reasonable doubt:

> 1. Three shots were fired during the course of the robbery: one by Clarence Jarmon upon entering, one by Milton Ray Jarmon as he slipped and fell, and the fatal shot by Petitioner.[2]
>
> 2. Petitioner's shotgun had an extremely light trigger-pull, nearly light enough to be classified as a "hair trigger."[3]
>
> 3. Petitioner held the weapon in his left hand; he is right-handed.
>
> 4. The time elapsed between Petitioner's throwing the bag at Ms. Otto and his pulling the trigger was a matter of seconds. No additional words were spoken, nor did Ms. Otto do anything that might have been perceived as provocative or threatening.
>
> 5. After the fatal shot that killed Ms. Otto, Petitioner did not rechamber the shotgun, although there was another cartridge in the magazine.

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[2] The State, for reasons that baffled the court of appeals, *see* App. 7a, n. 5, 41 F.3d at 218 n.5, insisted at trial that there were only two shots. But the forensic evidence was fairly compelling: casings were found from .22 and .25 caliber handguns, and there was a dead body killed by a third weapon. In addition, the confessions of three participants in the robbery referred to three shots.

[3] Apparently, "hair trigger" is a term of art. According to the evidence at trial, a typical shotgun requires trigger pressure of 5-7 pounds to fire, with 9-13 pounds not unusual. Jack Benton, a firearms expert witness called at trial, testified that Allridge's weapon required only 2.5 pounds of pressure. In Benton's opinion, a "hair trigger" can be fired with a pull of 2 pounds or less.

As it happened, one of the Whataburger employees behind the counter recognized Petitioner's voice as he issued his order to Ms. Otto. The four men were arrested later that night, and all confessed to their roles in the robbery, although Petitioner insisted that he had been startled by a loud noise and did not intend to fire the shotgun. The weapons were recovered by the police.

Petitioner's Trial for Capital Murder

Ronald Keith Allridge was tried for capital murder in the 297th Judicial District Court in Tarrant County, Texas, in November 1985. The presentation of evidence and arguments of counsel at the guilt stage took three days. Allridge's defense as presented by counsel was that he pulled the trigger of the shotgun as he turned in an unintentional, involuntary, and instantaneous reaction to the unexpected sound of Jarmon's .25 discharging. Petitioner himself did not testify. The witnesses included four persons present during the fatal robbery (two Whataburger employees and two customers), several police officers, and a firearms expert. On November 14, Allridge was convicted of capital murder, and the court convened a separate hearing to consider the two Special Issues laid down by Texas law as determinative of punishment. *See* 45a, *infra*. After the jury unanimously answered the Special Issues in the affirmative, Allridge was sentenced to death on November 20, 1985.

For purposes of the instant Petition, Allridge respectfully directs this Court's attention to the following occurrences at trial, all of which he contends denied him due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States:

> 1. The State, knowing that Milton Ray Jarmon had confessed to his participation in the robbery of the Whataburger, and that his confession corroborated Allridge's contentions with respect to the sequence of events, suppressed that confession even though Petitioner's counsel

had properly requested all exculpatory or mitigating evidence before trial pursuant to this Court's teaching in *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Allridge's counsel requested, but Judge Dickens declined to give, a jury instruction on felony murder. The jury were instructed only on capital murder, a crime defined as first-degree (*i.e.* intentional) murder committed in the course of committing a felony, and on simple (*i.e.* intentional) murder. No jury instruction encompassed a homicide crime not requiring specific intent, such as felony murder (killing in the course of a felony).

3. At the sentencing phase, the court refused to permit Petitioner to present evidence that, given his criminal record, a life sentence for Allridge would mean life without parole. The jury was therefore asked in one of the Special Issues to opine on whether he "would constitute a continuing threat to society," without any guidance on the premise of that conditional prediction, in derogation of this Court's ruling in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994). The jury was not permitted to know, that is, that any assessment of the future dangerousness of Ronald Keith Allridge must be predicated on the basis of the virtual certainty that, if allowed to live, he would spend the rest of his days in a maximum-security penal institution.

4. Also at the sentencing phase, which occurred before this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), Petitioner's counsel made the deliberate decision to minimize the presentation of evidence of emotional and mental disturbances, which would otherwise have been mitigating, because the jury had no vehicle

> for expressing its conclusion that Petitioner, though dangerous, deserved mercy. Such evidence would therefore have increased, rather than reduced, the likelihood of a sentence of death.

Subsequent Proceedings

Petitioner moved for a new trial after his conviction, but that motion was denied on January 24, 1986. His appeal from conviction and sentence was rejected by the Texas Court of Criminal Appeals on May 11, 1988, 762 S.W.2d 146, and this Court denied certiorari on February 21, 1989. 489 U.S. 1040.

On April 27, 1989, Petitioner applied for a writ of habeas corpus in the Texas trial court. A three-day evidentiary hearing was held before that court in October 1989, at the end of which the judge essentially signed the State's proposed findings of fact and conclusions of law, recommending that the Court of Criminal Appeals deny the writ. The appellate court heard oral argument, limited to Petitioner's claims under *Penry*, and then, over two dissenting votes, accepted the lower court's recommendation on June 26, 1991, 820 S.W.2d 152, rejecting the petition. A motion for rehearing was rejected on October 9, 1991.

A petition for a writ of habeas corpus was presented to the U.S. District Court for the Northern District of Texas on March 16, 1992. Judge Terry R. Means heard oral argument on February 16, 1993. The writ was denied on November 8, 1993, but Judge Means granted the certificate of probable cause to appeal required by Fifth Circuit rules on February 11, 1994. The court of appeals heard argument on June 20, 1994, and issued its opinion on December 15, 1994. *Allridge v. Scott*, 41 F.3d 213. No request for rehearing or rehearing en banc was filed.

REASONS FOR GRANTING THE WRIT

I. Petitioner Was Denied Due Process When the Trial Court Refused to Instruct the Jury on the Lesser Included Offense of Felony Murder: the Only Lesser Included Offense Raised by the Evidence.

Allridge's jury, at the guilt-innocence stage of the trial, was instructed on two offenses only: capital murder, defined as first-degree murder committed in the course of a felony, and simple murder. Both crimes require a specific finding of intent. Counsel's request for an instruction on felony murder -- killing in the course of a felony without murderous intent -- was rejected by the trial judge.

Capital murder and murder differ in two significant respects: a conviction for capital murder requires that the jury be persuaded of the defendant's guilt of another felony as well as murder, and only capital murder carries the death penalty. But they do not differ with respect to the critical, defining element: both crimes require a specific intent to kill. Yet Petitioner's sole defense was not that he was not guilty of robbery, but precisely that he lacked that intent. There was evidence presented at trial -- evidence acknowledged by the court of appeals below[4] -- sufficient to permit a jury to credit that defense. Additional evidence, which would have reinforced that possible outcome, was deliberately suppressed by the prosecution.

The jury had no way to indicate its acceptance of Petitioner's theory that he lacked the specific intent to kill Carla McMillen Otto, short of acquitting him. Given that he was clearly guilty of having killed the young woman, in the course of committing an armed robbery, acquittal was an untenable option. This Court taught in *Beck v. Alabama*, 447 U.S. 625 (1980), that the full benefit of the "reasonable doubt" standard, and therefore the constitutional requirement that the defendant receive due process of law, demands in such a case that the jury be provided a

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[4] *See* p. 10, *infra*.

"third option." And the "third option" cannot be "illogical": the court of appeals' term for a murder conviction on this record. App. 12a; 41 F.3d at 220.

The trial judge's denial of a felony murder instruction denied Petitioner due process. That denial is all the more unacceptable, and cries out all the louder for reversal, in light of the State's unlawful suppression of the confession of one of Petitioner's accomplices: *Brady* material tending to corroborate Allridge's assertion that he lacked the specific intent to kill.

A. Petitioner Had a Constitutional Right, Under *Beck v. Alabama*, to a Jury Instruction on Felony Murder.

A capital defendant is entitled to a jury instruction on a non-capital lesser included offense "if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater." *Allridge v. Scott*, App. 9a, 41 F.3d 213 at 218 (5th Cir. 1994), *citing Beck*, 447 U.S. 625, 633-637 & n.12 (additional citations omitted). The evidence at Petitioner's trial could have permitted a jury rationally to find that he was guilty of felony murder instead of capital murder: that is, that he lacked the intent to kill.

Specifically, the evidence to which Allridge respectfully directs the attention of the Court is the following. All of it would have permitted the inference that the fatal shot was not intentional murder, but was Petitioner's unintentional reaction.

1. Evidence of the shot sequence,[5] including indications that the fatal shotgun blast immediately followed the accidental discharge of Milton Ray Jarmon's .25 caliber handgun.

2. Evidence of the light trigger-pull on the shotgun.

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[5] The critical element of such evidence -- the confession of Milton Ray Jarmon -- was suppressed by the prosecution. *See* Part I. C, *infra*.

3. Evidence that Allridge held the weapon in his left hand, while he is right-handed.

4. The fact that, after the shot that killed Ms. Otto, Petitioner did not rechamber the shotgun, although there was another cartridge in the magazine.

5. The fact that no additional act of violence unrelated to executing the robbery occurred.

The state of mind that the prosecution had to attribute to Allridge in order to secure his conviction and capital sentence was the specific intent to kill. Had his actions been the result of an involuntary reflex, the State -- which bears the burden of proof of every element of the offense -- would be unable to demonstrate that he had the requisite intent. The court of appeals acknowledged all of this. The court noted that

> the jury was provided such evidence [of Allridge's state of mind] and obviously chose not to deduce from that evidence that Allridge lacked the specific intent to kill Otto.

App. 7a; 41 F.3d at 218, emphasis added.

One wonders how the court of appeals can have reached this conclusion about what the jury "obviously" chose. How would the jury have indicated a different choice? What would the jury have done had it chosen to deduce from the evidence "that Allridge lacked the specific intent to kill Otto," or that the State had failed to establish Petitioner's specific intent beyond a reasonable doubt? Surely it could not have convicted him of capital murder. But nor would it have found him guilty of murder, which differs from capital murder not one whit insofar as it requires the key element of specific intent. The "obvious" inference imputed to the jury by the court below is based on a faulty premise: that the jury had some way of indicating that it

accepted Petitioner's version of the facts, or that it had some reasonable doubt about the State's version.

The due process violation in this case is precisely this: that the jury had no way of accepting Petitioner's defense, and therefore the verdict cannot be read as a rejection, "obvious" or otherwise, of it. Its only choice, aside from acquittal, was an "illogical" one. If the jury believed that Allridge lacked the intent to kill, it had no other alternative but to set free a man who ended the life of an innocent victim, in the course of robbing her at gunpoint. That is precisely the "all-or-nothing" decision that this Court condemned in *Beck*.

The jury "obviously chose" to convict Allridge of capital murder, precisely as his Alabama jury "obviously chose" to convict Beck of capital murder. In neither case, however, did the jury "obviously" -- or otherwise -- reject the defendant's theory of defense: that he did not intend to kill. Neither jury had the possibility of accepting that defense, unless it was prepared to acquit. The court of appeals below committed precisely the question-begging fallacy that *Beck* condemned: it unconstitutionally presumed that a conviction for capital murder conclusively determined the issue of intent, even though the jury had no viable means for even addressing, much less resolving, that issue.

In a footnote, the court of appeals sought to blunt the force of *Beck* with a curiously tenuous reference to the "evidence" of Petitioner's intent. Citing the testimony of the victim's companion, the court of appeals proposed that the evidence "suggests, if anything," that Allridge had the necessary intent to commit murder. App. 10a, n.9; 41 F.3d at 219 n.9. The court's opinion is certainly a rational inference from the evidence it cites. So too would be the opposite conclusion, that the record "suggests" a startled, involuntary reflex. But it is beyond doubt that jurors, not judges, are the proper arbiters of these competing

inferences. As *Beck* again confirmed in identifying the origins of the principle it announced:

> A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of the absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.

447 U.S. at 625 n.11, *quoting Stevenson v. United States*, 162 U.S. 313, 323 (1896).

The process which Allridge is due under *Beck* is simply this: "if there be any evidence fairly tending to bear upon the issue" of Allridge's lack of specific intent to kill Carla Otto, then "it is the province of the jury to determine from all the evidence what the condition of mind was, and to say" whether the crime was capital murder (which requires that intent) or felony murder (which does not). *Id.* Petitioner respectfully submits that no court can properly foreclose the jury's inquiry into his state of mind, when the evidence is capable of either interpretation. *See Francis v. Franklin*, 471 U.S. at 325-26. And *Beck* thus declares, when death is the consequence, that a conviction cannot determine intent by implication.

B. Nothing in This Court's Jurisprudence Since *Beck* Justifies the Trial Court's Failure to Submit a Felony Murder Instruction

Jurors are necessarily presumed to be rational, or the institution would be meaningless and the criminal justice system fatally infected by caprice. This Court's decision in *Beck* acknowledged a critical exception to "the almost invariable assumption of the law that jurors follow their instructions,"

Richardson v. Marsh, 481 U.S. 200, 206 (1987), and that "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S., at 324 n. 9 (1985).

Confronted with "evidence unquestionably establish[ing] that the defendant is guilty of a serious, violent offense," 447 U.S. at 637, the voice of the community embodied in the twelve jurors might, in some circumstances, *rationally* opt for an "unwarranted" capital conviction rather than risk returning such an offender to their streets. It depends upon what other instructions the jury is given. A capital conviction is not *reliable* if there is a reasonable chance that the jury reached that conclusion not because it was persuaded of the defendant's guilt of the capital offense beyond a reasonable doubt, but because the alternative was unacceptable, irrational, illogical.

The key to *Beck* and its progeny -- including the case upon which the court of appeals claims principally to rely, *Schad v. Arizona*, 501 U.S. 624 (1991) -- is respect for the essential rationality of jurors, and the need to protect the reliability of verdicts with safeguards, especially when the consequence of failure to do so may be an unwarranted execution. The key to *this* case -- as properly belonging to *Beck*'s progeny -- is recognition that the jury's only alternatives to capital murder, simple murder and acquittal, were fundamentally illogical alternatives, as the court of appeals itself noted. App. 12a; 41 F.3d at 220. Only an instruction on *felony* murder would have provided the jury a *rational* alternative to conviction for capital murder.

The court of appeals conceded that, in his argument about the proper interpretation of this Court's decision in *Beck*, "Allridge's point is not without merit." App. 10a; 41 F.3d at 219. But the court felt constrained by its reading of *Schad* to conclude that there cannot be a constitutional infirmity in the refusal to give a specific lesser included offense instruction, so long as some

instruction is given that would offer the jury a third alternative to death or freedom. The court seriously erred, however, in its interpretation and application of *Schad*. Indeed, the Fifth Circuit's interpretation of that case would, if correct, effectively treat *Schad* as having overruled Justice Stevens's opinion for the Court in *Beck*. But that part of Justice Souter's decision in *Schad* in which he spoke for a majority of the Court made clear that no such radical result was intended. Far from supporting affirmance of the death penalty here, *Schad* is a strong vindication of the applicability of *Beck* to the case at Bar.

Schad was tried for the capital murder of Lorimer Grove. He admitted that he had stolen Grove's car, and certain other property belonging to him, but denied that he was a murderer, claiming that the two of them had been set upon, and that Grove had been killed, by unknown assailants. He requested a jury charge on the crime of theft, which the trial judge declined to give, instructing the jurors only on the capital offense, as well as on the non-capital charge of second-degree murder. He was convicted of the former and sentenced to die. The question before this Court was the reliability of that verdict and sentence.

The analysis began with *Beck*:

> Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all.

501 U.S. at 646. That principle had been reinforced in *Spaziano v. Florida*, 468 U.S. 447 (1984):

> The absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other

> words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.

Id. at 455, *cited in Schad*, 501 U.S. at 646-47. But this Court found that this "central concern of *Beck* simply [was] not implicated." 501 U.S. at 624. The instruction on second-degree murder had given the jury a non-capital "third option," instead of the stark (and constitutionally impermissible) choice between a capital conviction and acquittal.

Schad argued that he was entitled to an instruction on theft, because his theory of defense was not that he had killed Grove without premeditation, but that he had not killed him at all. Five Justices of this Court held that the second-degree murder charge was sufficient to protect the defendant's constitutional due process rights:

> To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

501 U.S. at 647-48. Yet the Court did not stop there. The Court did <u>not</u> hold in *Schad* that <u>any</u> "third option" presented to the jury would be sufficient to plug the constitutional gap. The key to the Court's holding in *Schad* is the two sentences following the portion just cited (upon which the court of appeals relied: App. 12a; 41 F.3d at 220). And it is this critical aspect that the Fifth Circuit ignored in the case at Bar:

> That is not to suggest that *Beck* would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence. *Cf. Roberts v. Louisiana*, 428 U.S. 325, 334-335 (1976) (plurality opinion). In the present case, however, petitioner concedes that the evidence would have supported a second-degree murder conviction.

501 U.S. at 648, emphasis added.

Twice in its decision below, the court of appeals stated without citation to the record that "sufficient evidence existed from which the jury could reasonably have concluded that Allridge was guilty of murder." App. 12a; 41 F.3d at 220. Acknowledging that such a conviction "would effectively acquit Allridge of robbery, a charge which he does not challenge," the court described such a hypothetical result as "illogical." *Id.*

But an "illogical" third choice -- a third option that makes no sense in terms of the record or the evidence -- cannot be sufficient to protect against unconstitutionality under *Beck*. An "illogical" verdict cannot at the same time be a "viable option." Nor did this Court say anything different in *Spaziano* or *Schad*.

The constitutional infirmity in the decision below, therefore, can be seen by holding up the Fifth Circuit's understanding of lesser included offense jurisprudence next to this Court's decision in *Schad* itself. Schad admitted that there was evidence from which the jury could find him guilty of second-degree murder, the non-capital "third option": such a conviction would have been a permissible and rational conclusion. In the case at Bar, the reviewing court itself -- although insisting that "sufficient evidence existed" to convict him of the non-capital offense[6] -- conceded that such a result would be "illogical."

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[6] There was, of course, evidence sufficient to convict Allridge of murder, in the sense that the evidence would have permitted a rational jury to conclude that he intentionally took the life of another person. But the evidence relevant to the murder charge was precisely the same as the evidence of his guilt of capital

In *Schad*, there was evidence before the jury that the defendant might have been guilty of any of three crimes: capital murder, second-degree murder, or theft. The last two are not capital offenses, and the defendant confessed to theft. This Court held that the charge as to one non-capital crime guarantees the reliability of the verdict and satisfies the constitutional standard of *Beck*.

But in the case at Bar, given that Petitioner's guilt of armed robbery and of killing Carla McMillen Otto were not in issue, there were only two possibilities: murder involving intent, or unintentional murder, both in the course of a felony. Simple murder was not a "viable option" for a jury that listened to the evidence. Such a conviction would, as the court below noted, have been "illogical." Petitioner's constitutional right to due process entitled him to a jury instruction on the only non-capital offense logically raised by the evidence: felony murder.[7]

C. The Suppression of *Brady* Material by the Prosecution Exacerbated the Due Process Violation.

Petitioner had a right to have his jury consider the evidence that weighed against the State's submission that he killed his victim intentionally. That evidence consisted of the admittedly inconclusive testimony of eyewitnesses; the forensic evidence supporting the contention that there were three shots fired at the Whataburger, the last two in rapid succession; the

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murder. In other words, if the jury accepted that evidence, since there was no contest of the robbery charge, the only rational conclusion was conviction for capital murder. If it did not accept that evidence, the only rational conclusion was acquittal. This is exactly the "all-or-nothing" choice condemned by this Court in every case from *Beck* to *Schad*.

[7] If the Fifth Circuit's reading of *Schad* were correct, then Petitioner would have had no grievance if his jury had been instructed only on capital murder and a misdemeanor weapons possession charge, or driving the getaway car with an expired license. Surely the jury could correctly have found him guilty of one of those offenses, even if that meant ignoring the overpowering evidence -- including his confession -- of his simultaneous guilt of more serious crimes.

light trigger-pull and the position of the shotgun; the fact that the gun was not rechambered after the fatal blast; . . . and the specific chronology of events provided in the confession of Milton Ray Jarmon. The last of these, however, was not available to Petitioner or to his counsel at trial, although the District Attorney for Tarrant County had the confession, knew of its relevance to Allridge, and had been requested to produce all material exculpatory as to guilt or mitigating as to punishment, as provided by this Court in *Brady v. Maryland*, 373 U.S. at 87 (1963). The prosecutors deliberately decided to withhold the Jarmon confession, citing an office "policy" not to make available to defense counsel statements given to the police by co-defendants.

The existence of such a "policy" can hardly be sufficient to override the constitutional rights of a person accused of a capital -- or of any -- crime. If the Jarmon confession is *Brady* material, then its suppression violated Petitioner's constitutional rights. The court below erred in concluding that the confession did not satisfy the requirements of *Brady*.

1. The Jarmon Confession Was Favorable to Allridge and Material to the Outcome

The court of appeals correctly noted that, under *Brady*, the suppression of evidence can constitute a denial of due process only if the evidence is both favorable to the defendant and material to his guilt or punishment. The court also held -- again quite correctly -- that the standard of appellate review is whether, had the suppressed evidence been disclosed, "there is a reasonable probability that . . . the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).

Yet the court denied Allridge's *Brady* claim, for two reasons. First, the court of appeals observed that the Jarmon confession "does not speak to Allridge's state of mind," which it called "the essence" of Petitioner's defense.[8] 41 F.3d at 217; App.

[8] As noted in the first part of this Petition, it is anomalous and deeply troubling for an appellate court in a capital case to acknowledge that a

7a. The court then held that the confession would have been "cumulative" evidence of its express contents: the timing and sequence of the gunshots, including the one that killed Carla Otto.

There is an inconsistency here that cannot be resolved. The prosecution in a case of capital murder must persuade the jury beyond a reasonable doubt that the accused intended to cause the death of his victim.[9] In this case, there was no real doubt that Allridge was the gunman. The only issue before the jury was the question of intent. That is what the court below must have meant when it accurately stated that Allridge's state of mind was the "essence" of his defense: the State had to prove that Allridge had the requisite intent, while his counsel's task was to create at least reasonable doubt in the mind of at least one juror. The Jarmon confession was uniquely suited to this objective.

This is what Jarmon stated about the shot sequence in his confession:

> I heard a shot go off and a glass broke out. I ran and jumped the counter. I heard another shot go off, it was my gun when I went over the counter. I was going over the counter and I slipped and fell on the floor. That's when I heard another shot go off.

Whether the Jarmon confession is believable is not the issue. Whether it is probative is not the issue. The issues are whether it is favorable to the defendant, and whether it is material. And Petitioner respectfully submits that it is both.

Mental states cannot, by their nature, be proved directly. To rebut evidence that X <u>intended</u> to do act A when the assertion that he in fact did it is not in dispute, it can be contended that X

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proposition is "the essence" of the defense, while at the same time sustaining the constitutionality of jury instructions that make it impossible for the jurors to credit that "essence" without acquitting a confessed robber and killer. *See* pp. 9-11, *supra*.

[9] The Texas definition of capital murder is set out in the Appendix, 44a, *infra*.

was forced to do it by someone else. Or that X did A but thought he was doing B, something quite different. Or that he was unaware that act B he intended to perform would have A as its natural consequence. Or that A was an involuntary reflex.

Evidence that an act was an involuntary reflex has always been admissible in proceedings in which intent is the determining factor for guilt.[10] An involuntary act cannot, by definition, be attended by the "requisite culpable mental state" to be murder or capital murder. *See, e.g., Womble v. State*, 618 S.W.2d 59 (Tex. Crim. App. 1981).

And so the conclusion of the court below that the Jarmon confession does not "speak to Allridge's state of mind" is simply wrong. It is not, perhaps, direct evidence of Petitioner's state of mind. But if that is the test, virtually nothing would be admissible. The State did not offer direct evidence either: it invited the jury (an invitation accepted also by the court of appeals) to infer Allridge's mental state from certain facts, including words that he spoke and actions that he and others took. But also relevant may be external factors. Were the jurors to have heard that, an instant before the fatal shot was fired, the room reverberated with the sound of a gunshot that no one -- least of all Petitioner -- expected, it is certainly possible that one or more of them would have been willing to infer that the second, fatal shot was a reflexive response to the first, and that it was fired irrespective of Allridge's lack of intent.

Nor is the Fifth Circuit's second reason for rejecting the characterization of the Jarmon confession as *Brady* material any

[10] *Cf. Francis v. Franklin*, 471 U.S. 322, 325-26 (1985). This Court, noting that the defendant's "only defense was that he did not have the requisite intent to kill," opined that "[t]he facts do not overwhelmingly preclude that defense. The coincidence of the first [fatal] shot with the slamming of the door, the second shot's failure to hit anyone, or take a path on which it would have hit anyone, and the lack of injury to anyone else all supported the lack of intent defense." Given that the defense was not "overwhelmingly preclude[d]," the defendant had a constitutional right to have the jury afforded the opportunity to consider it.

more persuasive, or any more consistent with this Court's teachings on how to read *Brady* and its progeny. The court below stated that there was other evidence from which the jury could have inferred that there were in fact three shots fired at the Whataburger, and so the Jarmon confession "would have been cumulative evidence with regard to the issue of whether a shot was fired immediately before Allridge fired the shot that killed Otto." 41 F.3d at 218; App. 8a.

Surely it is true that there was other evidence that three shots were fired. Although the State appeared to dispute this point -- a strategy that the court of appeals charitably described as "somewhat puzzling in light of the evidence," 41 F.3d at 218 n. 5; App. 7a n.5 -- there really can be no doubt about the number of shots. The critical question is about their timing and sequence. As to that, the evidence at trial was inconclusive, and nothing that the jury heard was as clear, as direct, as chronological, or as dispassionate as Milton Ray Jarmon's seemingly emotionless account of a night of crime and violence.

The court below concluded that the evidence already before the jurors failed to persuade them that the number or sequence of shots rebutted the State's case for murderous intent. "[T]he jury was provided such evidence and obviously chose not to deduce from that evidence that Allridge lacked the specific intent to kill Otto." 41 F.3d at 218; App. 7a. But the jury was in fact not presented with any evidence of the shot sequence that comported directly with Milton Ray Jarmon's account. There were two witnesses who said they heard three shots, and one who told the police he had heard three and then changed his mind before trial. But there was no one to testify that, after the second shot, the fatal shotgun blast followed immediately. Allridge's defense turned on that contention, and there was in the prosecution's files a document that corroborated that defense.

Had they heard it, the jurors would have been free to disbelieve the Jarmon confession, and even to refuse to draw from

it the inference Allridge's counsel would have invited. But Petitioner had a constitutional right to have that evidence produced. Had it been disclosed -- and had the jury been instructed on the crime of which Allridge was guilty if he lacked murderous intent (*i.e.*, felony murder) -- there is every likelihood that the outcome of the trial would have been different.

2. Suppression of the Jarmon Statement Had a Probable Effect on the Verdict

In *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3705 (No. 93-7927, April 25, 1994), the court of appeals held that the "materiality" test for *Brady* material depends upon a "probable-effect inquiry." If, after that test is applied, suppression of evidence "undermines confidence in the outcome of the trial," then it constitutes denial of a defendant's right to due process of law. *Kyles*, 5 F.3d at 811, *citing United States v. Bagley*, 473 U.S. 667 (1985).

Kyles's claim that the evidence suppressed in his case was *Brady* material ultimately failed, because a majority of the court found the possible relevance of the evidence limited to the engendering of residual doubt as to guilt at the punishment phase of his trial. Judge King dissented, finding it critical that "[t]he undisclosed evidence . . . 'fits hand in glove' with [the defendant's] theory of the defense advanced at trial." 5 F.3d at 831 (King, J., dissenting). But all three appellate judges agreed that the "probable-effect inquiry" is the test that must be applied: whenever a different verdict would be the reasonably probable effect of disclosure of the suppressed material, the reliability of the verdict rendered is undermined, and it cannot pass muster under *Brady* and *Bagley*.

In the case at Bar, the suppressed Jarmon confession speaks to one of the defining elements of the crime for which Petitioner was convicted. It also addresses the question of deliberateness, which is one of the Special Issues required to be reviewed by the jury at the sentencing phase.[11]

The suppression of the Jarmon confession -- which could have persuaded one or more jurors that the fatal shot was Petitioner's involuntary reaction to the sudden and unexpected discharge of Jarmon's firearm -- taken together with the trial court's refusal to instruct the jury on a crime not requiring intent, therefore rendered the verdict unreliable, and constituted a denial of Allridge's right to due process of law.[12]

II. Petitioner Was Denied Due Process When the Jury Was Asked to Determine His "Future Dangerousness," Without Being Permitted to Know What His Future Would Be If He Were Allowed to Live.

A. The Decision Below Is Inconsistent With This Court's Opinion in *Simmons v. South Carolina.*

In *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), this Court again reiterated the proposition that a capital defendant's "future dangerousness" is a legitimate factor to have his sentencing jury take into account. The Court has, at least since *Jurek v. Texas*, 428 U.S. 262, 275 (1976), considered the Second Special Issue in Texas to be equivalent to the question whether the defendant poses a future threat to society.

Yet in *Simmons*, seven Justices agreed that to be able to consider accurately a defendant's future dangerousness, the jury must know if there is any chance of his release from prison if he is permitted to live. Otherwise, there can be no certainty that any two jurors are basing their deliberations upon the same

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[11] *See* App. 44a. "Deliberateness" means something more than intention, since by the time a trial reaches the punishment phase, the capital defendant will already have been convicted of intentional murder. *See Fearance v. State*, 620 S.W.2d 577, 584 (Tex. Crim. App. 1980).

[12] Although Petitioner extensively discussed the Fifth Circuit's then-recent holding in *Kyles* in his reply brief below, the court of appeals made no reference to that case in its decision. Should this Court adopt the position of the dissenter in its resolution of *Kyles*, it may be appropriate summarily to vacate the decision of the court of appeals, remanding for express consideration of the relevance of that opinion.

assumption. That a defendant will never be eligible for parole is of the utmost relevance to the prediction of his future conduct. "[I]n such a case, the defendant should be allowed to bring his parole ineligibility to the jury's attention . . . as a means of responding to the State's showing of future dangerousness." 114 S.Ct. at 2200-01 (O'Connor, J., concurring).

In the trial court in Tarrant County, Petitioner proffered evidence in the form of an expert witness, ready to testify that, given his criminal record, a life sentence would mean life without parole. Judge Dickens refused to permit the jury to hear that testimony, concluding (like the trial judge in *Simmons*) that a defendant's parole status is not the jury's concern.

The only difference between Allridge's claim here and the one upheld by this Court in *Simmons* is that Petitioner's ineligibility for parole did not stem from the letter of the law, but rather from the consistent record and practice of parole boards in Texas. That is, Simmons wanted to tell his jury that he could never be released from prison, were his life spared, as a matter of law. Allridge wished to present evidence for the same conclusion as a matter of fact. But nothing in the plurality opinion in *Simmons* suggests that such a distinction lies at the root of the due process violation this Court found. The conclusion that "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he will never be released on parole," 114 S.Ct. at 2194, for example, does not distinguish between legal and factual ineligibility.

The court of appeals found authority for the contrary conclusion in a single sentence -- indeed, in a single word -- of the plurality opinion in *Simmons*. App. 14a, 15a; 41 F.3d at 221. The plurality of this Court wrote: "The logic and effectiveness of petitioner's argument naturally depended on the fact that he was <u>legally</u> ineligible for parole and thus would remain in prison if afforded a life sentence." 114 S.Ct. at 2194-95, emphasis added. It is hard to see why the letter of the law in South Carolina should

produce one result, while the consistent practice of Texas leads to the opposite conclusion.[13] What Simmons -- and what Petitioner here -- sought to show was simply that they would be forever behind bars if allowed to live, and not on the streets. Their future dangerousness, therefore, had to be assessed on that assumption, not on the premise that they would return to live among the general public.

As the plurality of this Court stated in *Simmons*, "the jury may have believed that petitioner could be released on parole if he were not executed." This belief could have "had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." It was accurately described as a "grievous misperception," encouraged by the denial to the jury of the opportunity to know the premise of their future-dangerousness deliberation. 114 S. Ct. at 2193. The failure of the court below to follow *Simmons* is another denial to Petitioner of the process that was his due, before he could constitutionally be sentenced to death.[14]

B. A Defendant's Due Process Right to Rebut the State's Case in the Sentencing Phase of a Capital Trial, Including the Presentation of Evidence Regarding Parole Ineligibility, Is Not a "New Rule" under *Teague v. Lane*

In a footnote to its opinion below, the Fifth Circuit panel concluded without discussion that even if Allridge's *Simmons* claim was successful on the merits, it would nonetheless be barred

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[13] Surely this distinction cannot turn on the fact that "consistent practices" may change, since the law itself may change. Nor does the possibility of executive clemency account for the difference, since there was no suggestion before the Court in *Simmons* about ultimate eligibility for clemency of prisoners serving statutory terms of life without parole.

[14] The Supreme Court of New Mexico reached the same conclusion in *Clark v. Tansy*, 882 P.2d 527 (N.M. 1994). That court held that a capital defendant has the right to have the jury accurately informed of the actual length of the prison sentence that would be alternative to death, including even such conditional factors as "good time."

by operation of the rule announced by the Court in *Teague v. Lane*.[15] App. 16a, n.11; 41 F.3d at 222 n. 11. But a close reading of *Teague* reveals that the Court did not announce a "new rule" in *Simmons*. Therefore, the due process right to present evidence of parole ineligibility is applicable to the case at Bar.

The plurality in *Teague* did not "attempt to define the spectrum of what may or may not constitute a new rule for retroactivity." To the contrary, it affirmed that it is "often difficult to determine when a case announces a new rule." 489 U.S. at 301. The plurality did, however, provide a general test: "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* It is evident from a careful examination of this Court's opinion in *Simmons*, and the caselaw it cited, that the holding of *Simmons* was dictated by precedent existing at the time Petitioner's conviction became final, and that the rule of *Simmons* therefore did not "break new ground" within the meaning of *Teague*. *Id.*

The plurality in *Simmons* emphasized that the refusal to inform the jury regarding the defendant's parole ineligibility, in cases in which future dangerousness was at issue, could not be reconciled with well-established precedents interpreting the Due Process Clause. *See* 114 S. Ct. at 2194. This Court has regularly held due process principles to require that a defendant be given the opportunity to present evidence in rebuttal of allegations of future dangerousness in the sentencing phase of a capital trial. *See id.*

The decision cited by the plurality, most relevant to the case at Bar, is *Gardner v. Florida*, 430 U.S. 349 (1977).[16] In

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[15] 489 U.S. 288, 301 (1989). The Supreme Court in *Teague* ruled that "new rules" of constitutional law did not retroactively apply to defendants whose convictions had become final before the rule was announced, i.e. cases on collateral review.

[16] The Court also discussed *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1

Gardner, this Court held that a capital defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain." 430 U.S. at 362. The trial judge, being privy to a presentence investigation report which contained confidential portions that were not disclosed to the defendant or his counsel, had rejected the jury's recommendation for life imprisonment and sentenced Gardner to death. 430 U.S. at 351.

This Court made clear that the mere possibility of a sentence of death on the basis of evidence which the defendant had no opportunity to rebut was enough to constitute a due process violation, even though "[t]he trial judge did not comment on the contents of the confidential portion." This meant, to the *Simmons* plurality, a constitutional right to present evidence of parole ineligibility. Indeed, the four Justices felt that *Gardner* "compels our decision today." 114 S.Ct. at 2194. That description by itself rebuts the contention that *Simmons* announced a "new rule."

It is evident, then, that Petitioner's due process right to rebut the State's allegations of future dangerousness arises from, and is in accordance with, a line of Supreme Court cases beginning at least as early as *Gardner* in 1977. *See Simmons*, 114 S. Ct. at 2194. Consequently, application of *Simmons* to Petitioner's case would not violate the retroactivity principles of *Teague* because it would not be a "new rule" for *Teague* purposes. Rather, *Simmons* is a mere application of a venerable principle, established long before Petitioner's trial took place. The *Teague* issue -- whether a case decided after a defendant's conviction has become final should ever apply retroactively -- does not arise. 489 U.S. at 307. Therefore, *Teague* presents no obstacle to the vindication of the Petitioner's constitutional right to present evidence regarding his parole ineligibility to rebut the State's allegations of future dangerousness.

(1986), and *Ake v. Oklahoma*, 470 U.S. 68, 83-87 (1985).

C. The Texas Statute Asks a Conditional Question, but Does Not Specify the Condition

The Second Special Issue does not really ask the jury about a defendant's future dangerousness: it asks in the conditional whether he would be a danger, without specifying the condition. It asks not for a prediction, which is constitutionally permissible, but for unfounded speculation, which is not.

Justice Souter indicated that he was aware of this problem in his dissent in *Graham v. Collins*, 113 S.Ct. 892, at 925, n.10 (1993) (Souter, J., dissenting) (emphasis in original)[17] writing:

> I note . . . that the trial judge's remarks at voir dire may have inappropriately left the jury consider whether Graham would have been dangerous in the future if he were set free. . . . In light of my conclusion that Graham's death sentence should be vacated, I need not address here the propriety of a sentence imposed on the basis of future dangerousness to the public when there is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole.

The issue is one readily apparent to native speakers of English: a question that involves a "would" must set the condition, the premise, that gives sense to the question. Petitioner does not argue, as the State contended below, that the jury did not know the meaning of the word "would." He argues instead that the jury knew it too well. One juror might well have determined her assessment of Allridge's dangerousness on the assumption that he would be set free, while another wondered whether he would commit the same crime again, given the chance. Since the Special Issue was phrased in the conditional without specifying the condition, there was every chance that the results of Petitioner's trial lacked the "certainty that the verdict rested on proper

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[17] *Graham* was a Texas case; therefore, the proposition that "there is no possibility" of a sentence of less than life without parole depended on findings of fact, not conclusions of law.

grounds," required by this Court's teachings in, *inter alia*, *Mills v. Maryland*, 486 U.S. 367, 376 (1988).

For this reason too, then, the capital sentence meted out in the case at Bar is constitutionally defective, and must be set aside.

III. Petitioner Was Unconstitutionally Prevented from Introducing Mitigating Evidence of His Petitioner's Mental Illness and Abuse as a Child

This Court, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), upheld the constitutionality of the Texas death penalty statute in effect at the time of Petitioner's trial, but insisted that, in any given case, some vehicle be provided to the jury for the consideration of evidence in mitigation of punishment. This followed decisions of the Court in such cases as *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which required that the jury be permitted to give effect to all mitigating evidence a defendant might choose to present.

Yet the very evidence of debilitating mental condition, abused childhood, or emotional disturbance, that might persuade jurors to recommend mercy were they able to do so, would also inevitably have militated in favor of an affirmative response to the Second Special Issue. That is, by virtue of the fact that the defendant suffers from a serious pathology, it is more likely, not less likely, that he "would commit criminal acts of violence that would constitute a continuing threat to society."

Allridge's trial counsel, keenly aware of the "two-edged" nature of such evidence offered in mitigation, deliberately decided to withhold it. Their testimony at the State habeas proceeding presented their specific and reasoned conclusion that the risk of harming their client outweighed the predictable probability that the evidence would serve its intended purpose.

The court below summarily rejected this argument, in reliance on this Court's decision in *Delo v. Lashley*, 113 S.Ct. 1222, 1225 (1993). But unlike Delo, Allridge did offer evidence

in support of his claim of emotional disability. Admittedly, the evidence was not all that was, or that could have been, available to him. But he raised the issue squarely. To attempt to develop at length the theory that he could not restrain himself, that he could not keep from committing acts of violence if left in society at large, would have been to invite the hangman's noose.

To the extent, therefore, that before this Court's decision in *Penry*, Texas law effectively prevented a capital defendant from presenting all of the defense available to him, the death sentence imposed upon Petitioner was in violation of his right to due process, and, for this reason too, should be set aside.

CONCLUSION

The Petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Dated: March 15, 1995

APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-9137

RONALD KEITH ALLRIDGE,
Petitioner-Appellant,

v.

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

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* * *

Before GARWOOD, SMITH, and DeMOSS, Circuit Judge:

Ronald Keith Allridge was convicted by a jury of capital murder and sentenced to death. He appeals from the district court's decision denying his petition for a writ of habeas corpus. We now affirm the district court's decision to deny the writ.

I.

On March 25, 1985, at approximately 12:30 a.m., Ronald Keith Allridge, Milton Ray Jarmon, and a third accomplice committed armed robbery at a "Whataburger" restaurant in Fort Worth, Texas. Allridge carried a shotgun while his accomplices each carried a handgun. During the course of the robbery,

Allridge shot and killed Carla McMillen Otto. The state of Texas indicted and, in September 1985, tried Allridge for the capital murder of Otto.

At trial, the evidence presented showed that there were three gunshots during the course of the robbery. The sequence of events was as follows. Immediately upon entering the restaurant, the third accomplice shot out the glass door on the east side of the restaurant with his handgun; he then remained positioned by the west door for the duration of the robbery. Milton Jarmon went immediately to the ordering counter and leapt over it to ransack the cas registers. In the process of leaping over the counter, Jarmon dropped his handgun, which discharged. At the same time that Milton Jarmon was heading for the counter, Allridge confronted Otto and her two friends, all of whom were seated in a booth. Allridge pointed his shotgun at Otto, tossed a bag at her, and said, "Fill it up bitch." The bag fell to the ground, whereupon Allridge shot Otto.

Although Allridge confessed to killing Otto, he pled not guilty to the charge of capital murder. In his confession to the police, Allridge claimed the shotgun fired accidentally because he was startled by another gunshot. He did not take the stand in his defense, and his confession was only entered into evidence by the prosecution at the sentencing proceedings. In his confession, he stated that the initial shot, which was fired through the glass door, was the shot which startled him. At trial, however, counsel for Allridge claimed that Allridge was startled instead by the shot fired accidentally by Milton Jarmon. Jarmon, in fact, had given a statement to the police which corroborated Allridge's version of the sequence of shots during the robbery, wherein Jarmon said that his gun accidentally discharged as he leapt over the restaurant counter during the robbery. Jarmon also stated that he then heard another shot fire, which both parties agree was the shot by Allridge that killed Otto. Prior to trial, the government informed counsel for Allridge that Jarmon had given a statement to the

police. Allridge's counsel requested a copy of Jarmon's statement. The government, citing a longstanding department policy against disclosure of co-conspirators' statements, denied the request. Rather than attempting to procure Jarmon's statement by other means (such as asking Jarmon's lawyer or seeking a court order), counsel for Allridge elected to proceed to trial without the benefit, if any, of Jarmon's statement.[1] He asserted that he was guilty not of capital murder (i.e., intentional killing during the commission of a robbery) but only of felony murder (i.e., unintentional killing during the commission of a robbery).

Notwithstanding the omission of Jarmon's statement, Allridge submitted other evidence to the jury that validated his version of the sequence of shots. Melvin Adams, an employee at the time of the robbery, gave a statement to the police immediately after the murder. In his statement, Adams stated that he heard three gunshots: the initial shot which broke the glass door, and then two shots in rapid succession right before the robbers left the store. At trial, however, Adams recanted and testified during direct examination by the government that he heard only two gunshots, separated by approximately one minute. Adams testified that he first heard the gunshot that shattered the glass door. He then stated that one of the robbers leapt over the counter to ransack an open cash register and that, in the process, knocked over another register.[2] The robber then returned to the other side of the counter and fled the restaurant. During cross-examination, counsel for Allridge seized on Adams' statement to the police, wherein he stated that he had heard three gunshots. Adams denied the accuracy of his statement to the

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[1] Jarmon invoked his Fifth Amendment right at Allridge's trial and refused to testify.

[2] Milton Jarmon was the robber who leapt over the counter. It was at this point, Jarmon said in his statement to the police, that his gun accidentally fired.

police. Nevertheless, counsel for Allridge entered it into the record.

Two additional witnesses provided testimony that arguably corroborates Allridge's version of events. Sharon Burns testified for the defense that she noticed a robber leap over the counter and also that she heard "two or three" popping sounds. Teresa Barton also testified for the defense that she heard two shots separated by only seconds.

Cary Jacobs, who was dining with Otto at the time of the robbery, testified that as the robbers entered the restaurant, one of them shattered the glass door with a single gunshot. Upon entering with the others, Allridge pitched a bag to Otto and said, "Fill it up, bitch." The bag fell to the ground, whereupon Allridge shot Otto. Jacobs testified that Allridge then ordered Jacobs to "pick up the bag." Jacobs complied, relinquished his wallet, and observed the robbers leaving the store. Jacobs testified that he heard neither Jarmon's gun discharge nor the cash register hit the floor.

Finally, both the defense and the state proffered their own firearms expert. Jack Benton testified for the defense that only 2.5 pounds of pressure was needed to pull the trigger on Allridge's shotgun.[3] Benton further testified that while 2.5 pounds did not qualify as a "hair trigger," it nonetheless was "extremely low." On cross-examination, Benton admitted that he attempted to make the shotgun fire accidentally but failed. Frank Shiller testified as a rebuttal witness for the state that four pounds of pressure is needed to pull the trigger of Allridge's shotgun.

After the presentation of the evidence, Allridge requested the trial court to instruct the jury on two lesser included offenses: murder and felony murder. The court denied Allridge's request and instructed the jury on capital murder and murder only. The jury returned a capital murder verdict in November 1985. In

[3] The shotgun was found the day after the robbery in Allridge's apartment.

accordance with Texas' death penalty statute, Tex. Code Crim. Proc. Ann. art. 37.071(a) (Vernon 1981),[4] the trial court held a separate proceeding before the jury to determine whether Allridge should be sentenced to death or life imprisonment. After the presentation of the evidence, the trial court instructed the jury to answer two "special issues:"

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Id. art. 37.071(b), (1) - (2). Because the jury unanimously answered both questions affirmatively, the trial court in November 1985 sentenced Allridge to death. The Texas Court of Criminal Appeals affirmed Allridge's conviction and sentence in May 1988. See Allridge v. State, 762 S.W.2d 146 (Tex. Crim. App. 1988). The United States Supreme Court finalized Allridge's conviction and sentence when it denied his writ of certiorari in February 1989. Allridge v. Texas, 489 U.S. 1040 (1989). Allridge then commenced state habeas proceedings. After his petition for state habeas corpus relief in the Texas Court of Criminal Appeals was denied, see Ex Parte Allridge, 820 S.W.2d 152 (Tex. Crim. App. 1991), Allridge filed a petition for habeas corpus in federal district court, pursuant to 28 U.S.C. § 2254 (1988). The district court denied the petition. Allridge now

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[4] Texas has since amended its death penalty statute.

appeals the district court's denial of his habeas petition, presenting several issues on appeal. We affirm.

II.

In his first claim, Allridge contends that the state failed to disclose material and exculpatory evidence to him at trial. Prior to trial, Allridge filed a motion to require the government to disclose evidence tending to exculpate Allridge. The state did not disclose Jarmon's confession. Allridge now claims that the state's failure to disclose Jarmon's confession violated his Fourteenth Amendment right to due process under Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court has established that a prosecutor must disclose evidence to a criminal defendant if that evidence is (1) favorable to the defendant, and (2) material to the defendant's guilt or punishment. Brady, 373 U.S. at 87. We have defined "material" to mean a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. United States v. Weintraub, 871 F.2d 1257, 1261 (5th Cir. 1989).

Allridge contends that he has a valid Brady claim with regard to the Jarmon statement. First, he claims the statement is favorable because it buttresses his version of events. Specifically, Allridge claims that Jarmon's statement corroborates Allridge's contention that the accidental firing of Jarmon's gun startled him, causing the "accidental" shotgun blast that killed Otto. Second, he claims the statement is material (i.e., it probably would have affected the outcome) because it aids in establishing Allridge's state of mind. The state was required to prove that Allridge had the specific intent to kill Otto. The Jarmon statement, Allridge claims, could have led the jury to conclude that Allridge was, in fact, startled by Jarmon's gunshot and therefore did not have the specific intent to kill Otto. The state responds that Jarmon's statement is neither exculpatory nor material because it does not speak to Allridge's state of mind. Jarmon's statement says only that he heard a gunshot after his gun discharged. Jarmon's

statement, the state notes, does not -- and cannot -- speak to Allridge's state of mind when he killed Otto.

We find Allridge's Brady claim unpersuasive. Allridge is in a position to assert a Brady claim now simply because his trial lawyer chose not to procure Jarmon's statement through other means. Allridge's trial counsel testified at the state habeas proceeding that, prior to trial, he had become aware of Jarmon's statement. He stated that he requested a copy from the government but his request was denied. Significantly, he further testified that he did not attempt to procure the statement by other means, such as perhaps asking Jarmon's lawyer or seeking a court order. Allridge, in effect, now asks us on federal habeas appeal to remedy a situation of his own making. We decline to do so because, once again, our standard of review is whether there is a reasonable probability that, had the evidence been disclosed (or, in this case, otherwise procured), the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682-83 (1985).

We cannot say that it would be. To begin with, as the state points out, the Jarmon statement does not speak to Allridge's state of mind, which is the essence of Allridge's defense. The statement establishes only what the evidence at trial showed to be obvious: that three, and not two, shots were fired. The statement does not raise any issue as to whether Allridge possessed the requisite intent to kill Otto. Furthermore, to the extent that any evidence of a third gunshot somehow speaks to Allridge's state of mind, the jury was provided such evidence and obviously chose not to deduce from that evidence that Allridge lacked the specific intent to kill Otto. Allridge, for example, introduced evidence of the spent shell from Jarmon's gun, thereby conclusively proving that a third shot was fired.[5] In addition, the jury was presented

[5] The government nonetheless chose to argue at trial that only two shots were fired. We find the government's trial strategy to be somewhat puzzling in light of the evidence.

with Melvin Adams' statement to the police, wherein he stated that three shots were fired. While Adams later recanted, his statement nonetheless was presented to the jury. In addition, the jury heard the testimony of Sharon Burns and Teresa Barton, both of whom testified that they heard a minimum of two shots after the original shot which shattered the glass door. The Jarmon statement, in other words, would have been cumulative evidence with regard to the issue of whether a shot was fired immediately before Allridge fired the shot that killed Otto and, therefore, would not have affected the outcome of Allridge's trial. Bagley, 473 U.S. at 682.[6] We find that the government's failure to disclose the statement does not constitute a Brady violation.

III.

Allridge next argues that the state trial court's jury instructions were constitutionally defective. At the conclusion of his trial, Allridge requested the court to instruct the jury on the lesser included offenses of murder and felony murder. The court, however, instructed the jury only on capital murder and murder.[7] Allridge now contends that the trial court's failure to include a felony murder instruction violated his Fourteenth Amendment right to due process as delineated in Beck v. Alabama, 447 U.S. 625 (1980).

In Beck, the capital defendant participated in a robbery in which the defendant's accomplice struck and killed an 80-year-old man. The defendant claimed that, while he intended to rob the victim, he did not intend to kill him. The state nonetheless tried

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[6] Thus, we need not determine whether Allridge's Brady claim alternatively fails simply because his own lack of reasonable diligence is the sole reason for not obtaining the Jarmon statement. See United States v. Ellender, 947 F.2d 748, 757 (5th Cir. 1991) ("where the defendant's own lack of reasonable diligence is the sole reason for not obtaining the pertinent material, there can be no Brady claim").

[7] The trial court refused to give a felony murder instruction because no evidence existed from which a jury could conclude that Allridge's shot was involuntary.

the defendant for capital murder.[8] At the conclusion of the trial, the trial court, pursuant to state law, instructed the jury that it could "either convict[ ] the defendant of the capital crime, in which case it is required to impose the death penalty, or acquit [ ] him, thus allowing him to escape all penalties for his alleged participation in the crime." Id. at 629. In other words, even though felony murder is a lesser included offense of the capital offense of robbery/intentional killing, Alabama law forbade trial courts from issuing a lesser included offense instruction in capital cases.

The jury convicted the defendant of capital murder and, as required, sentenced him to death. On direct appeal, the Supreme Court held that the Alabama statute violated the defendant's right to due process. The Court began by noting that, under both state and federal criminal law, the standard for determining whether a lesser included offense instruction is warranted in non-capital cases is well-established: the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater. Id. at 633-37 & n. 12 (citing, among other cases, Keeble v. United States, 412 U.S. 205 (1973), and Day v. State, 532 S.W.2d 302 (Tex. Crim. App. 1975)). The purpose of the standard, the Court stated, was to ensure that the jury would accord the defendant the full benefit of the reasonable doubt standard. Id. at 634. Though Alabama argued that its "all or nothing" death penalty statute furthered that goal, the Court concluded that the statute actually risked undermining the reliability of a jury's verdict because "the unavailability of the third option . . . may encourage the jury to convict for an impermissible reason -- its belief that the defendant is guilty of some serious crime and should be punished. Id. at 642. The Court concluded that, if due process precluded such a risk in

[8] Under Alabama law at that time, one of fourteen capital offenses included "[r]obbery or attempts thereof, when the victim is intentionally killed by the defendant." Ala. Code § 13-11-2(a) (2) (1975).

non-capital cases, then due process certainly precluded the same risk in capital cases, wherein the stakes are much higher. Thus, as we have stated before, "Beck stands for the proposition that 'the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."'" Cordova v. Lynaugh, 838 F.2d 764, 767 (5th Cir. 1988) (quoting Hopper v. Evans, 456 U.S. 605, 610 (1982)).

Allridge contends that, even though the trial court in this case issued a third instruction, i.e., murder, the jury for practical purposes was not given that option because both capital murder and murder require the jury to find that Allridge had the specific intent to kill, which is precisely the element that Allridge challenges. Allridge does not challenge whether he intended to commit armed robbery; he concedes that point. Thus, Allridge argues, the choice between capital murder and murder is really a Hobson's choice because, once the jury concludes that Allridge had the specific intent to murder, the jury will be driven to choose capital murder over murder because the robbery element of capital murder is uncontested. In other words, according to Allridge, while the instructions in this case may be different in form from the instructions in Beck, the two are functionally equivalent in that the jury was not given a third option.

Allridge's point is not without merit. The more reasonable alternative instruction would have been, as Allridge requested, felony murder because of the elements at issue in this case. Allridge's claim, however, ultimately fails because it rests on an erroneous reading of Beck and its progeny. Even if we were to assume that the evidence in this case warranted a felony murder instruction,[9] due process would not require that Allridge

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[9] We note that that assumption is not easily made because the only evidence regarding Allridge's state of mind at the time of the shooting suggests, if anything, that Allridge intended to shoot Otto. Specifically, Cary Jacobs was the only witness who testified as to Allridge's demeanor at the time of the shooting. According to Jacobs, Allridge entered the restaurant and approached

be given an instruction that conforms with that evidence. In Schad v. Arizona, 111 S. Ct. 2491 (1991), the defendant was charged with first-degree murder for robbing and murdering an elderly man. The defendant requested a jury instruction on theft as a lesser included offense of first-degree murder. The trial court refused an instructed the jury on first-degree murder, second-degree murder, and acquittal. The jury, after being denied a theft instruction by the court, convicted the defendant of first-degree murder, whereupon the court sentenced him to death.

On direct appeal, the defendant argued that, pursuant to Beck, he was entitled to a theft instruction. The Court rejected the defendant's generous reading of Beck. The Court began by noting that Beck addresses only those cases in which the jury is faced with an "all-or-nothing" decision. Id. at 2504-05. In such cases, the Court reasoned, a jury's capital murder verdict is presumptively unreliable because " '[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free.' " Id. at 2505 (quoting Spaziano v. Florida, 468 U.S. 447, 455 (1984)). But if the jury is given a third instruction, particularly one that is supported by the evidence, then due process is no longer implicated.

The defendant in Schad countered that, while a third instruction may satisfy due process, any third instruction will not suffice because, if the jury agrees with the defendant's theory of the case, it will be unable to register its view. The Court disagreed, pointing out that the key consideration in a Beck claim

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the booth where Otto, Jacobs, and a third person were eating. Jacobs testified that Allridge threw the bag at Otto, said, "Fill it up, bitch," and shot Otto when she failed to do so. After shooting Otto, according to Jacobs, Allridge turned the gun on Jacobs and directed Jacobs to pick the bag off the floor and fill it with his valuables. Jacobs complied because, with the shotgun aimed at his head, Jacobs feared that Allridge would shoot him as well. Once Jacobs had relinquished his valuables, Allridge left the restaurant. Jacobs' testimony regarding Allridge's demeanor does not describe someone who has just "accidentally" shot another person.

is not the form of the jury's instructions but the reliability of a jury's capital murder verdict. The Court further reasoned:

> To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Schad, 111 S. Ct. at 2505; see also Montoya v. Collins, 955 F.2d 279, 285-86 (5th Cir. 1992) (a lesser included offense instruction satisfies due process, even though the instruction did not conform with the defendant's theory of the case).

We find that Schad controls our disposition of this issue. While the trial court's third instruction did not conform to Allridge's defense strategy, sufficient evidence existed from which the jury could reasonably have concluded that Allridge was guilty of murder. We recognize that had the jury returned a verdict of murder only, such a verdict would effectively acquit Allridge of robbery, a charge which he does not challenge. As illogical as this hypothetical verdict may be, it does not render the trial court's jury instructions unconstitutional because, in the final analysis, sufficient evidence existed for the jury to convict

Allridge of murder. Our reading of Beck and Schad instructs us that the trial court was not constitutionally bound to provide a wider menu of jury instructions. Instead, because the jury had the viable option to choose murder over capital murder, we are satisfied that that option ensured the reliability of the jury's capital murder verdict.

IV.

Under Texas law, a defendant may not be sentenced to death without a prior determination by the sentencing jury that, inter alia, the defendant represents a future danger to society. Tex. Code Crim. Proc. Ann. art. 37.071 (b) (2). At the sentencing hearing, Allridge proffered expert testimony outside the presence of the jury that indicated Allridge almost certainly would be ineligible for parole and, therefore, did not pose a future danger. The trial court, however, refused to permit Allridge to introduce the evidence. Allridge now contends that the trial court's evidentiary ruling, and the court's subsequent refusal to instruct the sentencing jury that Allridge almost certainly would serve the remainder of his life in prison, violated his Fourteenth Amendment right to due process.

In particular, Allridge maintains that the trial court denied his due process right to rebut the state's case against him as a future danger. Allridge principally relies on Gardner v. Florida, 430 U.S. 349 (1977), wherein the Supreme Court vacated a death sentence because the trial court relied in part on confidential portions of a presentence investigation report that were not available to the parties. The Court reasoned that the defendant's right to due process was violated "when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Id. at 362 (plurality opinion). Allridge maintains his opportunity to deny or explain his future dangerousness was similarly denied when the trial court refused to allow him to introduce evidence of his parole ineligibility. The Court, according to Allridge, has traditionally regarded evidence

of parole ineligibility as constitutionally relevant. In California v. Ramos, 463 U.S. 992 (1983), for example, the Court ruled that a state statute requiring trial courts to instruct capital juries that a sentence of life imprisonment without the possibility of parole could be commuted by the governor was not unconstitutional. Allridge essentially argues that, when considered together, Gardner and Ramos stand for the following proposition: when the state argues that a capital defendant represents a future danger to society and therefore should be sentenced to death, then that defendant is constitutionally entitled to introduce evidence regarding his parole ineligibility.

Allridge insists that this proposition was recently endorsed by the Supreme Court in Simmons v. South Carolina, 114 S. Ct. 2187 (1994). In Simmons, the defendant was charged with murdering an elderly woman. Immediately prior to trial, the defendant pled guilty to two separate assaults on elderly women. Thus, once the defendant was convicted in Simmons of his third and most recent criminal offense, he was rendered ineligible for parole under the state's "two-strikes-and-you're-out" statute.[10] At sentencing, the state argued that the defendant represented a future danger to society and, therefore, should receive the death sentence. The defendant, in response, proffered evidence outside the presence of the jury that demonstrated that, as a matter of state law, he was ineligible for parole. The trial court rejected the defendant's proffer, noting that South Carolina juries may not consider the issue of parole when sentencing a defendant convicted of capital murder. The jury later sentenced the defendant to death.

On direct appeal, the Supreme Court reversed the defendant's sentence. The Court began its analysis in Simmons by revisiting a variety of its due process cases, wherein the Court

[10] See S.C. Code Ann. § 24-21-640 (Supp. 1993). The statute provides: The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing from a prior conviction, for violent crimes as defined in Section 16-1-60.

established that the due process clause entitles a criminal defendant to a complete defense. Id. at 2193-95. According to the Court, the trial court's refusal to admit the defendant's evidence regarding parole ineligibility ran afoul of those cases because the state "raised the specter" of future dangerousness without affording the defendant the chance to demonstrate that "he was legally ineligible for parole and thus would remain in prison if afforded a life sentence." Id. at 2194-95. The Court recognized that, as a general rule, the decision about whether to inform a jury about parole eligibility is left to the states. Id. at 2196 (citing Ramos, 463 U.S. at 1014). But the Court qualified that rule when future dangerousness is at issue. Specifically, "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." Id. at 2190.

Allridge reads Simmons to mean that he was constitutionally entitled to introduce evidence of his parole ineligibility. He recognizes that Texas, unlike South Carolina, did not statutorily provide for parole ineligibility at the time of his conviction. But he characterizes that distinction as irrelevant because, regardless of whether a capital defendant is ineligible for parole as a matter of law or a matter of fact, the defendant should not be denied the opportunity to rebut the state's case for future dangerousness with evidence of parole ineligibility.

We disagree. As the Court made clear in Simmons, the "logic and effectiveness of petitioner's argument naturally depended on the fact that he was legally ineligible for parole." Id. at 2194-95 (emphasis added). A capital defendant's parole ineligibility, in other words, must be a matter of law because evidence of such ineligibility is inherently "truthful" and allows the defendant to deny or explain the state's case for future dangerousness. Id. at 2196. But if a defendant's ineligibility is a matter of fact, i.e., the defendant probably will not be eligible for

parole, then the evidence is purely speculative (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence. Relying on Ramos, the Court in Simmons reaffirmed that states can properly choose to prevent a jury from engaging in such speculation as a means of providing greater protections in their criminal justice systems than constitutionally required. Id. (citing Ramos, 463 U.S. at 1014). Texas accordingly has chosen to keep from juries evidence or instructions of parole eligibility, see Rose v. State, 752 S.W.2d 529, 534-35 (Tex. Crim. App. 1987), and on two separate occasions, we have chosen not to meddle with the state's chosen policy. See King v. Lynaugh, 850 F.2d 1055, 1060-61 (5th Cir. 1988) (en banc); O'Bryan v. Estelle, 714 F.2d 365, 388-389 (5th Cir. 1983). But Texas, unlike South Carolina, did not statutorily provide for parole ineligibility at the time of Allridge's conviction.

Thus, Simmons is inapplicable to this case.[11] The Court, in fact, suggested as much when it pointed out that, while Texas and South Carolina refuse to inform juries about parole eligibility, Texas does not provide "a life-without-parole sentencing alternative to capital punishment." Simmons, 114 S. Ct. at 2196 n. 8. We therefore read Simmons to mean that due process requires the state to inform a sentencing jury about a defendant's parole ineligibility when, and only when, (1) the state argues that a defendant represents a future danger to society,[12] and (2) the

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[11] In addition to failing on the merits, Allridge's Simmons claim would be barred under the non-retroactivity limitation the Supreme Court announced in Teague v. Lane, 489 U.S. 288, 301 (1989). Specifically, if we were to conclude, as Allridge urges us to do, that due process entitles a capital defendant to introduce evidence of parole ineligibility whenever the state argues the defendant is a future danger, regardless of whether the state statutorily provides for parole ineligibility, such a conclusion certainly would constitute a "new rule" and therefore would be barred under Teague.

[12] We note that Simmons particularly applies to those cases in which the state argues that the defendant is a future danger to free society. But when the

defendant is legally ineligible for parole. Because Texas did not statutorily provide for parole ineligibility at the time of Allridge's conviction, we find Allridge's reliance on Simmons to be unavailing.[13]

V.

Finally, Allridge argues that, in three separate ways, the second special issue submitted to the sentencing jury prevented the jury from giving effect to certain mitigating evidence. Therefore, Allridge argues, the jury's ultimate death sentence violated Allridge's Eighth Amendment right against cruel and unusual punishment as defined in Penry v. Lynaugh, 492 U.S. 302 (1989). Allridge first contends that his alleged parole ineligibility constitutes mitigating evidence and that, because the trial court refused to allow him to introduce this evidence, the second special issue prevented the jury from giving the evidence proper mitigating effect. In the preceding section, we concluded that, as a matter of due process, Allridge was not constitutionally entitled to submit evidence or an instruction regarding the likelihood, or not, of his being paroled. The fact that Allridge now presents it as

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state argues that the defendant poses a future danger to everybody, fellow inmates included, then Simmons is inapplicable because whether the defendant is eligible for parole is irrelevant. Simmons, 114 S. Ct. at 2194 n. 5. For example, given his proclivity for assaulting only elderly women, the defendant in Simmons argued that he did not pose a future danger to anyone in prison. Id. at 2191. In this case, however, the state pointed out that Allridge had committed acts of violence against other prisoners during a previous incarceration and, therefore, posed a future danger wherever he may be.

[13] In connection with his Simmons claim, Allridge attacked the wording of the second special issue of Texas' death penalty statute as unconstitutionally vague. The issue asks "whether there is a probability that the defendant would constitute a continuing threat to society?" Tex. Code Crim. Proc. Ann. art. 37.071 (b) (2). Allridge maintains that the use of the word "would" is not premised on any specific condition, such as: would he pose a future danger if imprisoned for life? Allridge's vagueness claim is essentially another way of making the same point, i.e., that the state constitutionally deprived him of informing the jury of his parole ineligibility. For reasons already provided in our discussion of Simmons and Ramos, we find Allridge's vagueness claim unavailing.

a Penry cruel and unusual punishment claim, rather than as a Simmons due process claim, does not require us to reach a different conclusion. We reject Allridge's first Penry claim.

Allridge's next Penry claim is much more typical of the numerous Penry claims we have considered in the last five years. At sentencing, Allridge's father -- a non-expert as to medical diagnoses -- testified that Allridge allegedly suffered mental illness and abuse during a previous incarceration. At sentencing, Allridge requested an instruction permitting the jury to give mitigating effect to his father's testimony. The trial court refused, and Allridge now claims that the trial court's refusal deprived him of his right under Penry to an instruction beyond the two statutory special issues. We disagree. We have stated that, while Penry appears to be worded broadly, the case has been interpreted narrowly. Andrews v. Collins, 21 F.3d 612, 629 (5th Cir. 1994). We, for example, have construed Penry to mean that the capital defendant must be able to demonstrate that his crime is attributable to a uniquely severe disability. Madden v. Collins, 18 F.3d 304, 306-09 (5th Cir. 1994); Barnard v. Collins, 958 F.2d 634, 636-38 (5th Cir. 1992). Allridge, to say the least, has failed to show any such linkage based solely on the non-expert, hearsay testimony of his father. His second Penry claim therefore fails.

In his last Penry claim, Allridge argues that the second special issue creates a disincentive for introducing medical evidence of mental disabilities because, if introduced, the evidence may encourage, rather than discourage, the jury to affirmatively conclude that Allridge represents a future danger to society. As we have stated before, capital defendants cannot base a Penry claim on evidence that could have been, but was not, proffered at trial. Crank v. Collins, 19 F.3d 172, 175-76 (5th Cir. 1994); Barnard v. Collins, 958 F.2d 634, 637 (5th Cir. 1992); May v. Collins, 904 F.2d 228, 232 (5th Cir. 1990). As the Supreme Court has stated, "[n]othing in the Constitution obligates state courts to give mitigating circumstance instructions when no

evidence is offered to support them." Delo v. Lashley, 113 S. Ct. 1222, 1225 (1993). We therefore reject Allridge's last Penry claim.

VI.

For the foregoing reasons, we AFFIRM the decision of the district court to deny the writ.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Texas
Fort Worth Division

Civil No. 4:92-CV-202-Y

RONALD KEITH ALLRIDGE,
Execution No. 818,

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division.

MEMORANDUM OPINION and ORDER

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* * *

Pending before the Court is Respondent's Motion for Summary Judgment, filed June 19, 1992. On February 16, 1993, this Court held a hearing in the above-styled and numbered cause. After carefully considering said motion, the response, the arguments of counsel, and all memoranda submitted in support thereof, this Court is of the opinion that the motion is meritorious and should be GRANTED.

I.

The undisputed facts reveal that approximately 12:30 a.m. on March 25, 1985, Ronald Keith Allridge, Milton Ray Jarmon, and Clarence Jarmon committed armed robbery at a Whataburger restaurant. Allridge carried a shotgun and the other two carried handguns. Upon entering the restaurant, Milton Ray Jarmon

jumped over the counter to grab money from an open cash register, fell, and accidentally discharged his pistol. While Jarmon was emptying the cash register, Allridge threw a black bag toward Carla McMillen Otto ("Otto"), a customer, and said, "Fill it up, bitch." The bag fell to the ground. Before Otto could say anything, Allridge shot her. Allridge then ordered another customer, Cary Jacobs, to "pick up the bag." Jacobs handed Allridge the bag and his wallet and then backed up against a wall with his hands raised. The three men then left the restaurant through one of the shattered glass doors which Clarence Jarmon had shot out as they entered the restaurant.

Ronald Keith Allridge was indicted in Tarrant County, Texas for Otto's capital murder and tried in the 297th District Court of Tarrant County before a jury, which, on November 14, 1985, found him guilty. After a separate hearing on punishment, the jury affirmatively answered the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1991). Allridge was sentenced to death as required by law. The Court of Criminal Appeals affirmed the conviction and sentence, Allridge v. State, 762 S.W.2d 146 (Tex. Crim. App. 1988), and the United States Supreme Court denied certiorari, Allridge v. Texas, 489 U.S. 1040, 109 S. Ct. 1176 (1989).

The trial court subsequently scheduled Allridge's execution for May 2, 1989, but then stayed it when Allridge filed an application for writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1991). After holding an evidentiary hearing, the court entered factual findings and legal conclusions and recommended denial of the writ. The Court of Criminal Appeals denied the writ, Ex Parte Allridge, 820 S.W.2d 152 (Tex. Crim. App. 1991), and denied rehearing on October 9, 1991. Allridge then filed the instant petition for writ of habeas corpus in federal district court. He has exhausted all state court remedies.

II.

Allridge has asserted that a multitude of constitutional errors occurred at his trial. This Court shall address each issue separately.

A. Suppression of Material Exculpatory Evidence

Allridge argues that the prosecutor kept from the defense material and exculpatory statements by codefendant Milton Jarmon and witness Bobby Haney, in violation of his Fourteenth Amendment right to due process. Allridge also claims that the prosecution interfered with his counsel's ability to represent him effectively by failing to disclose these statements. He asserts that had his attorneys known about the two statements, they would have been able to prove his defensive theory that he did not kill Otto intentionally.

At trial, Allridge asserted that he was startled by the report of Jarmon's gun and that he fired his weapon involuntarily in reaction to the noise. After his arrest, Jarmon gave the following statement to the police:

> I heard a shot go off and a glass broke out. I ran and jumped the counter. I heard another shot go off, it was my gun when I went over the counter. I was going over the counter and I slipped and fell on the floor. That's when I heard another shot go off.

Allridge asserts that his statement is the only evidence which corroborates his version of events and supports his claim that he did not intentionally kill Otto. He also argues that even if Jarmon's confession had not raised a reasonable doubt as to his guilt, it could have resulted in the jury's returning a negative answer to the first punishment issue, thereby sparing him from execution. Allridge called Jarmon as a defense witness at trial, but Jarmon invoked his Fifth Amendment privilege against

self-incrimination and refused to testify. Because he did not have access to Jarmon's statement, Allridge alleges that the state abridged his right to due process pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Regarding the statement of witness Bobby Haney, the record reflects that the state provided Allridge's attorneys with Haney's name, address, and telephone number several weeks prior to trial. Testimony at the state evidentiary hearing reflects that Allridge's investigator even contacted Haney but determined that his testimony would not be helpful. Defense counsel thus did not call him as a witness in Allridge's trial.

Brady imposes upon a prosecutor a duty to disclose evidence that is (1) favorable to the defendant, and (2) material either to the defendant's guilt or punishment. Brady, 373 U.S. at 87, 83 S. Ct. at 1196. See also United States v. Agurs, 427 U.S. 97, 109, 96 S. Ct. 2392 (1974). The purpose of Brady is to assure that a defendant is not denied access to favorable exculpatory and impeachment information known to the government, but unknown to him. See Agurs, 427 U.S. at 103, 96 S. Ct. at 2397; Giglio v. United States, 405 U.S. 150, 14, 92 S. Ct. 763 (1972); United States v. Newman, 849 F.2d 156, 161 (5th Cir. 1988).

It is undisputed that the prosecutors did not make the Jarmon statement available to the defense. Viewing this statement in the light most favorable to Allridge, this Court finds that the statement would have been favorable to him because it does somewhat corroborate his claim that he unintentionally squeezed the trigger of his shotgun. The state, however, contends that even if the Jarmon statement is favorable, it was not material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. United States v. Weintraub, 871 F.2d 1257, 1261 (5th Cir. 1989). The Fifth Circuit defines reasonable probability as probability "sufficient to undermine confidence in the outcome of the trial." Weintraub, 871 F.2d at 1261. Under

Texas law at the time of Allridge's trial, statements of accomplices against their penal interest were admissible at the trial of other participants in a crime only under limited circumstances. Such statements could be admitted only if: (1) the state's case against the defendant was based on circumstantial evidence; (2) the guilt of the accomplice was inconsistent with the guilt of the defendant; or (3) the facts showed that the accomplice was so situated that he might have committed the crime. Ramirez v. State, 543 S.W.2d 631, 632-33 (Tex. Crim. App. 1976). In addition, the statement must have demonstrated sufficient indicia of reliability so that it independently qualified as an exception to the hearsay rule. Id. The state habeas corpus found, as does this Court, that the state's case against Allridge was not circumstantial because it consisted of positive eyewitness testimony identifying him as the murderer. Jarmon's guilt was consistent with Allridge's guilt, and Jarmon was not so situated at the time that he could have fired the fatal shot. The Court finds that this statement, even if it was favorable, is not material because it does not prove Allridge's version of the events and would not have altered the jury verdict as to guilt or punishment. Jarmon stated that he heard his gun go off as he was leaping over the counter, and after that, he heard another shot, which the evidence indicates was the one fired by Allridge that killed Carla McMillen Otto. Jarmon does not describe Allridge's actions prior to firing the shot, and indeed, did not know what Allridge was doing, saying, or thinking at the time he shot Otto. Other eyewitnesses, however, testified about Allridge's behavior as he fired the shot. Based on this evidence, this Court cannot agree with Allridge that there was a reasonable probability that, had the state disclosed Jarmon's statement, the result of the proceeding would have been different.

Similarly, even if the Haney statement been admitted into evidence, it would not have had the effect that Allridge claims because it does not, and could not, address Allridge's mental state at the time of the killing. This Court fails to see how the fact that

the state did not reveal the existence of the Jarmon and Haney statements to counsel for Allridge affected their performance at trial. Allridge's claim is without merit.

B. The Trial Court's Refusal to Charge the Jury on Felony Murder

Allridge contends that the trial court's failure to instruct the jury on a lesser-included offense of felony murder violated Allridge's rights under the Fifth, Sixth, and Fourteenth Amendments. The record reflects that Allridge requested instructions on murder, murder with a specific intent charge, murder with a culpable mental state of "knowingly" only, and felony murder. The court gave a charge that substantially tracked Allridge's requested charge on murder. Allridge now argues that the evidence supported a finding that he was guilty of felony murder and that the trial court erred in denying his requested charge.

In Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382 (1980), the United States Supreme Court invalidated a state statute which prohibited an Alabama judge in a capital murder trial from instructing the jury on a lesser-included offense of felony murder, even though evidence existed of such a lesser crime. The Court held that, where a capital murder statute requires the jury to assess the death penalty upon an affirmative determination of guilt, the unavailability of an instruction on a lesser-included, non-capital offense enhances the risk of an unwarranted conviction and death sentence. Thus, the Court found that the state is constitutionally precluded from withholding that "third option" from the jury. Beck, 477 U.S. at 637-38, 100 S. Ct. 2389-90. The Court concluded that Alabama's statutory scheme impermissibly increased the likelihood that the jury would return a verdict of guilty not because it had found the defendant guilty of the capital crime, but because it believed the defendant

guilty of some serious crime and felt that he should be punished rather than set free. Beck, 477 U.S. at 642-43, 100 S. Ct. at 2392.

Under the Texas capital murder and sentencing statutes, the failure to provide a lesser-included instruction does not involve the concerns addressed in the Beck decision. Beck "was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided." Hopper v. Evans, 456 U.S. 605, 611, 102 S. Ct. 2049, 2052 (1982). The Texas statute, unlike the "all or nothing" Alabama statute, provides for a two-tiered jury determination: first, whether the defendant is guilty and, second, whether he should receive a sentence of death or life. Thus, unlike the situation presented in Beck, the failure to give a lesser-included offense instruction does not result in a Texas capital jury's being forced to choose between setting the defendant free or convicting him of the capital crime and sentencing him to death. Beck does not mandate a lesser-included offense instruction when a capital statute does not pose the potential for unreliable sentencing inherent in the Alabama scheme. See Montoya v. Collins, 955 F.2d 279 (5th Cir. 1992).

Alternatively, Allridge argues that his conviction is unreliable because the jury was not given an instruction regarding felony murder and thus could not find that Allridge did not intend to kill Otto. Under Texas law, felony murder is a lesser-included offense of capital murder. Santana v. State, 714 S.W.2d 1, 8 (Tex. Crim. App. 1986). Felony murder requires proof that the defendant was intentionally committing or attempting to commit a felony, other than voluntary or involuntary manslaughter, and, in the course of so doing, committed or attempted to commit an act clearly dangerous to human life that caused the death of an individual. Tex. Penal Code Ann. § 19.02 (a) (3). Capital murder requires that the murder be intentionally committed while the defendant is in the course of committing another felony. Id. § 19.03 (a) (3). As in Beck, Allridge claims that the jury was

instructed either to convict him of intentionally shooting Otto or to acquit him. Allridge asserts that the jury was prohibited from making a reasonable deduction from the evidence that Allridge did not intend to kill her.

The controlling language in Beck addresses whether "the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Beck, 477 U.S. at 635, 100 S. Ct. at 2388. In this case, as the Court of Criminal Appeals found on direct appeal, the evidence did not warrant an instruction on a lesser-included offense because there was no evidence that Allridge did not intend to kill Otto. Allridge, however, asserts that the evidence does not suggest felony murder because there was no direct evidence of his mental state at the time of the shooting and the trigger on the shotgun he was using required a light pull in order to fire. But a defendant's mental state can, and usually is, determined by the facts surrounding the commission of the crime. Rose v. Clark, 478 U.S. 570, 581, 106 S. Ct. 3101, 3107 (1986). As previously discussed, eyewitnesses testified to Allridge's cold-blooded behavior just before and after he shot Otto. Moreover, the fact that the trigger could be fired with a light amount of pressure does not show that Allridge did not intend to commit the murder. On the contrary, Allridge's own expert testified that he would not classify the shotgun as having a "hair trigger" and that he had been unable to get the weapon to fire accidentally. Because the evidence did not support a felony murder conviction, the trial court did not err in failing to give the requested lesser-included offense jury instruction.

C. The Jury's Inability to Give Mitigating Effect to Evidence that Allridge was Abused and Mentally Ill

Allridge argues that application of the Texas capital sentencing statute violated the Eighth and Fourteenth Amendments because the statutory special issues did not allow the jury to give mitigating effect to his evidence, offered through his

father's testimony at trial, that Allridge had been abused by fellow inmates and had been diagnosed schizophrenic, both occurring at some unspecified time while Allridge was in prison for a 1976 murder conviction. Because the trial court failed to give an instruction on consideration of mitigating evidence and the jury could not otherwise consider the evidence in answering the punishment issues, Allridge claims that he is entitled to relief pursuant to Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934 (1989).

Allridge's death sentence was based upon the jury's affirmative responses to the two statutory punishment phase issues. See Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1991). Under the Texas capital sentencing statute, the jury may give mitigating effect to any evidence that, if credited and given sufficient weight by the jury, raises a reasonable doubt on a punishment phase issue. In Penry, the Supreme Court held that, where a capital defendant introduces evidence about his background, character, or circumstances of the offense that reflects a reduced personal culpability and the jury cannot give effect to the mitigating force of that evidence in responding to Texas' statutory punishment phase issues, the trial court must, upon request, provide instructions which allow the jury to consider and give mitigating effect to such evidence. White v. Collins, 959 F.2d 1319, 1322 (5th Cir.), cert. denied, 112 S. Ct. 1714 (1992). Although a capital crime defendant is entitled to an individualized sentencing decision that is a reasoned moral response to the evidence, including mitigating evidence, Penry does not require that a jury be able to give effect to a defendant's mitigating evidence in whatever manner or to whatever extent the defendant desires. White, 959 F.2d at 1322. A death sentence should not be set aside unless there is a "reasonable probability" that the jury would have interpreted instructions to preclude effective consideration of the mitigating force of the defendant's evidence, as that evidence actually was presented at trial. Boyde

v. California, 494 U.S. 370, 382 & n. 5, 110 S. Ct. 1190, 1198-99 & n. 5 (1990). "Thus, where the jury is able to give effect to the major mitigating thrust of evidence in responding to the statutory punishment issues, the fact that a defendant can identify mitigating value beyond the scope of the statutory issues does not require the submission of an additional issue or instruction allowing the jury to give further mitigating effect to the evidence." White, 959 F.2d at 1322-23.

In the present case, the mitigating evidence introduced by Allridge provides no basis for relief under Penry. While Allridge presented hearsay testimony of unspecified abuse in prison and a diagnoses of schizophrenia while in prison, there was absolutely no evidence presented that Allridge currently suffers from schizophrenia or any adverse affects from the alleged abuse or that his behavior when he shot Otto was in any fashion attributable to these purported conditions. Accordingly, this Court finds that Allridge's evidence fails to demonstrate a reduced culpability and, thus, does not implicate Penry. See Barnard v. Collins, 958 F.2d 634, 638-39 (5th Cir. 1992), cert. denied, 113 S. Ct. 990 (1993) (a capital defendant is not entitled to have jury express mitigating potential of evidence unrelated to a defendant's culpability or capacity for rehabilitation).

D. Failure to Present Mitigating Evidence

Allridge contends that his trial counsel did not investigate significant mitigating evidence and/or suppressed that evidence at trial because they believed that the sentencing statute precluded jury consideration of it outside the scope of the two special issues. Allridge claims that the state, through the judge and the Texas sentencing statute, violated both his Sixth Amendment right to counsel and the Eighth Amendment ban against cruel and unusual punishment. Specifically, he contends that the state so interfered with "the ability of counsel to make independent decisions about how to conduct [his client's] defense" as to render counsel's

performance ineffective pursuant to Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984).

Allridge's claim, however, fails as a matter of law in this circuit. May v. Collins, 948 F.2d 162, 165-68 (5th Cir. 1991), cert. denied, 112 S. Ct. 907 (1992). The only mitigating evidence put on by trial counsel at the punishment phase of the trial consisted of the testimony of Allridge's father and Paul Kratz, the officer who took Allridge's confessions. During the three-day state habeas evidentiary hearing, Allridge proffered the evidence that his counsel allegedly should have presented at trial, including the testimony of Dr. J. Randall Price who testified about Allridge's right-hemisphere brain dysfunction.

The Court of Criminal Appeals has held consistently that all relevant mitigating evidence is admissible at the punishment stage of a capital murder trial. See, e.g., Anderson v. State, 701 S.W.2d 868, 873-74 (Tex. Crim. App. 1985), cert. denied, 479 U.S. 870 (1986). Allridge, however, faults the trial court for failing to give supplemental instructions regarding mitigating evidence even though Allridge did not suggest that the absence of such an instruction might cause him to forego presenting mitigating evidence. Allridge's trial counsel did not request a ruling, despite available state procedures by which counsel could have apprised the court of a perceived problem. Pursuant to Tex. Code Crim. Proc. Ann. art. 36.14, 36.15 (Vernon Supp. 1991), Allridge's counsel could have requested special instructions, objected to the jury charge, or proffered such evidence outside the presence of the jury by a bill of exception. At trial, Allridge's presentation and discussion of punishment phase evidence focused on the future dangerousness inquiry of the second special issue only.

This Court finds that the Texas capital sentencing procedures did not interfere with counsel's ability to develop and present mitigating evidence nor with his ability to request additional punishment phase instructions, if he perceived such

instructions to be necessary to allow the jury to consider and give effect to mitigating evidence. Moreover, the circumstances alleged by Allridge fall short of the affirmative state interference with counsel's ability to act as an advocate that would amount to a constructive denial of counsel. See Strickland, 466 U.S. at 686, 104. S. Ct. at 2063-64.

E. Ineffective Assistance of Counsel

Allridge next argues that counsel at trial and on appeal rendered ineffective assistance. Specifically, he asserts that counsel were ineffective at trial because they failed to: (1) request an instruction on the effect of one negative vote as to a punishment issue and to object on constitutional grounds to the statute that prohibited giving such an instruction; (2) object to the absence of a reasonable alternative to the death penalty and to the lack of an instruction that the jury could render a verdict that would result in a life sentence without possibility of parole; (3) object to the introduction of unadjudicated offenses and to request an instruction that the jury could consider such offenses only if convinced beyond a reasonable doubt that Allridge committed them. Allridge also asserts that counsel were ineffective on appeal for not raising numerous claims that were available.

Habeas petitions claiming that counsel rendered ineffective assistance in violation of the constitution must meet Strickland's two-prong standard. To prevail, a criminal defendant must demonstrate:

> First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, . . . that the deficient performance prejudiced

> the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 867, 104 S. Ct. at 2064.

1. Counsel's Performance at Trial

a. failure to present mitigating evidence

Allridge argues that trial counsel had no strategic justification for failing to investigate, develop, and present mitigating evidence. He argues that counsel could have explored in depth the extent of his psychological problems, childhood development difficulties and troubles in prison as an adolescent and young man. Allridge contends that if this Court finds that the Texas scheme did not effectively prevent counsel from developing mitigating evidence, then it must find that counsel's failure to do so constituted ineffective assistance. For the reasons previously stated, Allridge's claim is unconvincing.

b. failure to request instruction at punishment phase

Allridge claims counsel failed to request an instruction at the punishment phase of the trial informing the jury of the effect of a single juror's answering one of the punishment issues, "no." The Texas capital sentencing statute at the time of Allridge's trial required the court to charge the jurors that they could not answer any of the punishment phase issues "yes" unless they agreed unanimously and that they could not answer any issue "no" unless ten or more jurors agreed. Tex. Code Crim. Proc. Ann. art.

37.071 (d) (1) & (2). Although the sentencing statute required the court to assess a life sentence when jurors were unable to agree on a response to a submitted issue, it specifically prohibited the court or the attorneys from informing a juror of the effect of the failure to agree on a submitted issue. Art. 377.071 (e), (g). Thus, counsel's request would have been contrary to law, and therefore, unnecessary. See McCoy v. Lynaugh, 874 F.2d 954, 963 (5th Cir. 1989).

c. failure to argue that the statute is unconstitutional

On a corollary, Allridge also contends that counsel should have objected that the statute which precluded informing the jurors of the effect of a single negative vote on a punishment issue is unconstitutional. The Texas Court of Criminal Appeals, however, has previously considered such claims and found no constitutional violation. Draughon v. State, 831 S.W.2d 331 (Tex. Crim. App. 1992).

d. failure to object to the death penalty

Finally, Allridge contends that counsel should have objected on unspecified federal constitutional grounds that Texas provided no reasonable alternative to the death penalty and that the court's instructions did not include a statement that the jury could render a verdict that would result in a sentence of life imprisonment without the possibility of parole. This allegation is wholly conclusory, cites no authority on which counsel bases such objections, and fails to show either deficient performance on counsel's part or prejudice to the defense.

e. failure to object to unadjudicated offenses

Similarly, Allridge complains that trial counsel did not object to the state's introduction of unadjudicated offenses at the punishment phase of trial and did not request an instruction that the jury could not consider such offenses in answering the

punishment issues unless first finding beyond a reasonable doubt that Allridge committed them. The law is clear both in the Fifth Circuit and in Texas, however, that the state may use unadjudicated offenses to assist the jury in answering the second punishment issue. See Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), cert. denied, 471 U.S. 1030 (1985); Smith v. State, 676 S.W.2d 379 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1061 (1985). Thus, the Court finds Allridge's argument meritless.

2. Counsel's Performance on Appeal

Although Allridge complains about his attorneys' performance on appeal for failing to raise and preserve certain grounds for relief, he does not specify what grounds should have been raised, other than to refer to those contained in his writ application. The record reflects that counsel on appeal raised twenty-two grounds of error. Each was carefully and thoroughly briefed and addressed by the Court of Criminal Appeals. This Court finds that the additional allegations made in his habeas petition are lacking in merit and would not have changed the outcome of the appeal had his attorneys raised them. Allridge has shown neither deficiency nor prejudice to the appeal. This Court finds that Allridge's claim of ineffective assistance of counsel on appeal is meritless.

F. The Unconstitutionality of the Texas Capital Sentencing Statute

Allridge asserts that the Texas capital sentencing statute is unconstitutional on its face and as applied in this case. First, he contends that the terms *intentionally* which is the culpable mental state required to prove capital murder and *deliberately*, as used in the firs: punishment issue, are linguistically synonymous. He argues that a jury finding that the defendant is guilty of capital murder thus compels a jury finding that the murder was committed deliberately. The Court of Criminal Appeals has determined that *intentionally* and *deliberately* are not linguistic

equivalents, and that *deliberately* has a narrower meaning than *intentionally*. See Fearance v. State, 620 S.W.2d 577, 584 (Tex. Crim. App. 1980), cert. denied, 454 U.S. 899 (1981). Moreover, even if the two terms do share approximately the same meaning, there is no resulting constitutional violation. The constitutionally-required narrowing of the class of defendants eligible for the death sentence may occur either at the guilt phase of the trial by restricting capital crimes to certain specifically defined offenses or at the punishment phase by requiring the finding of aggravating circumstances before a death sentence can be imposed. This Court can find no constitutional violation if one of the elements that makes the crime a capital one also is a factor that must be found at the punishment phase.

Allridge also asserts that the second punishment issue asks a conditional question without addressing the condition. This, he contends, results in unreliable sentencing. The second issue is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. 37.071 (b) (2). Allridge argues that by asking the jury what *would* happen, the state must inform it of the condition that is implied by *would*. Otherwise, Petitioner contends, jurors could interpret the condition differently and arrive at different answers to the question.

The proper standard to determine whether a jury instruction is ambiguous and subject to erroneous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 278, 110 S. Ct. 1190, 1198 (1990). The record reflects that the jury did not formally express any confusion over the issue during its deliberations and did not ask for any clarification on the meaning of the second issue. There is no evidence to suggest that there is a reasonable likelihood that the jury applied the

instruction incorrectly. Upon examination of the instruction, this Court finds that the wording of the second issue is not ambiguous in a way that would prevent the jury from considering the mitigating evidence that was before it. Accordingly, Allridge's claim is denied.

G. Jury Venire Pool - A Fair Cross-Section of the Community

Allridge contends that his rights under the Sixth and Fourteenth Amendments were violated because Hispanics were systematically excluded from the venire from which his jury was chosen. He alleges that the Tarrant County practice of compiling jury lists from voter registration rolls is inherently discriminatory. In support, he proffers that Hispanics comprised 6.49% of the population of Tarrant County in 1980, but that the jury pool in 1985, the year that he was tried, had only 3.48% Hispanics and that only 3.23% of the venire members from which his jury was chosen were Hispanic.

To demonstrate a prima facie violation of the Sixth Amendment fair cross-section requirement, a defendant must demonstrate: (1) the group alleged to be excluded is a "cognizable" or "distinctive" group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the under-representation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979). In this case, Allridge has only identified a cognizable group. This Court finds, as the state habeas court found, the approximately 3.25% disparity between the percentage of Hispanics in Tarrant County and the percentage on his venire is not significant. Moreover, the use of voter registration rolls for the purpose of randomly selecting venires is racially neutral. See United States v. Wesevich, 666 F.2d 984, 990 (5th Cir. 1982). The mere fact that minorities may not register to vote in

proportion to their population does not invalidate the use of voter registration lists to select jury venires. This Court finds that Allridge's claim is without merit.

H. Allridge's Confession

Allridge complains that his confession, in which he admitted to the commission of thirteen robberies, was obtained in violation of his rights under the Fifth Amendment. Specifically, he contends that the record does not reflect a knowing, intelligent, and voluntary waiver of his rights as set forth in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Whether a defendant has waived his Fifth Amendment rights is determined under a two-part totality of the circumstance test: (1) the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception; (2) the waiver must have been made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986); Evans v. McCotter, 790 F.2d 1232, 1238 (5th Cir.), cert. denied, 479 U.S. 922 (1986).

In Allridge's state habeas proceeding, the trial judge found that Allridge knowingly, intelligently and voluntarily waived his Miranda rights and freely gave a written statement. He made the extensive and detailed factual findings to which this Court accords a presumption of correctness pursuant to 28 U.S.C. § 2254 (d). See Wicker v. McCotter, 783 F.2d 487, 498 (5th Cir.), cert. denied 478 U.S. 1010 (1986) (state court's finding that confession was not induced by promises of psychiatric help entitled to presumption of correctness).

Allridge cannot prevail on his claim because the factual predicate necessary for him to obtain relief on his Fifth Amendment claim is absent. Given the record in this case, the

trial court's finding of a knowing, intelligent and voluntary waiver is clearly correct. Allridge cannot seriously contend otherwise.

I. Admission of Allridge's Prior Criminal Conduct

Allridge contends that the introduction of unadjudicated criminal conduct and a void prior conviction in the punishment phase of his trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Allridge claims that the admission of unadjudicated conduct violates the Eighth Amendment because such evidence is "unreliable" due to the fact that the crime had not previously been proven beyond a reasonable doubt. Because the Eighth Amendment requires "reliable" sentencing, Allridge reasons that the trial court incorrectly admitted this evidence. The Fifth Circuit, however, has specifically rejected this argument, whether raised under the Eighth Amendment, Equal Protection Clause or Due Process Clause, in the context of the punishment phase of a capital murder trial. Williams v. Lynaugh, 814 F.2d 205, 207-08 (5th Cir.), cert. denied, 484 U.S. 935 (1987). Allridge's claim is squarely foreclosed by the law of this circuit.

Allridge also contends that the evidence of his conviction as an adult for a murder committed in 1976 when he was fifteen years old did not receive an examining trial before being certified and tried as an adult. Allridge has had two full and fair opportunities at trial and in his state habeas corpus action to present evidence in support of his claim, yet he has failed to do so. After making factual findings, the Court of Criminal Appeals found that Allridge failed to sustain his burden of demonstrating the prior conviction was void after the state made a *prima facie* showing of validity. Allridge v. State, 762 S.W.2d at 157. In so failing to comply with the state procedural requirement, federal habeas review of Allridge's claim is barred under the procedural default doctrine absent a showing of "cause" for the default and the resulting "prejudice." Murray v. Carrier, 477 U.S. 478, 106 S.

Ct. 2639 (1986). Allridge make neither showing, and is therefore not entitled to relief.

J. Sufficiency of the Evidence to Support the Guilty Verdict and the Affirmative Answer to the First Punishment Question

Allridge next complains that the evidence offered at trial was insufficient to support the jury's guilty verdict and its affirmative answer to the first punishment question. He specifically contends that the evidence is insufficient to prove beyond a reasonable doubt that he killed Carla McMillen Otto intentionally and that his conduct in causing her death was committed deliberately.

The standard of review when a state prisoner challenges the sufficiency of the evidence in a federal habeas corpus proceeding is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 320, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). In order to secure a conviction for capital murder, the state was required to prove beyond a reasonable doubt that Allridge intentionally committed the murder in the course of committing or attempting to commit robbery. Tex. Penal Code Ann. § 19.03 (a) (2). Under Texas law, "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." Id. § 6.03 (a). People are presumed to intend the natural consequences of their acts and intent can be inferred from the circumstances surrounding the crime. Rose v. Clark, 478 U.S. 570, 581, 106 S. Ct. 3101, 3107 (1986).

The evidence at trial showed that Allridge fired a shotgun at Otto from point-blank range and without provocation on her part. The evidence also showed that the trigger on the shotgun

required anywhere from 2.5 to 4 pounds of pressure to fire. Allridge's own expert, who testified that the trigger required 2.5 pounds of pressure, also stated that he would not classify it as a "hair trigger," and admitted that he had been unsuccessful in trying to make the gun fire accidentally. Finally, the testimony of Cary Jacobs reflected that Allridge handed a bag to Otto and ordered her to fill it up. She said nothing but raised her hands, which were empty, as if to indicate that she had no valuables to surrender. Thereupon, Allridge fired his shotgun and then directed Jacobs to pick up the bag and to hand over his wallet -- without showing any concern whatsoever for Otto's condition. This evidence is clearly sufficient to support the jury's finding that Allridge intentionally murdered Otto.

Similarly, Allridge contends that the evidence does not support the jury's finding at the punishment phase that he acted deliberately and with the reasonable expectation that the death of the deceased would result. Tex. Code Crim. Proc. Ann. art. 37.071 (b) (1). Under Texas law, the term *deliberately* is not defined for the jury. The Court of Criminal Appeals has noted, however, that *deliberately* has a narrower meaning than *intentional* and has a common sense meaning that is readily understandable to jurors. King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1088 (1978).

Here, the same evidence that supported the jury's finding that Allridge acted intentionally also was relevant to the inquiry whether he acted deliberately. The unprovoked firing of his shotgun from point-blank range, coupled with the facts that the trigger required a minimum of 2.5 pounds of finger pressure to activate it and could not be fired accidentally in tests conducted after the murder, all demonstrate that Allridge's action in killing Otto was deliberate. His claim of insufficient evidence is without merit.

K. The Formal Sentencing Procedure

Allridge asserts that both the trial court and the state capital sentencing procedures denied him his right to speak personally on his own behalf before the trial judge imposed his sentence. He claims that the common law right of allocution secures him the opportunity to address the trial court with a personal plea for mercy prior to sentence being imposed. Allridge contends that this denial violated the Fifth and Fourteenth Amendments.

Under Texas law, all evidence relevant to sentencing is admissible at the punishment phase. Tex. Code Crim. Proc. Ann. art. 37.071 § 1 (Vernon 1981). This includes the opportunity for the defendant to testify and offer whatever evidence he desires to persuade the jury that a death sentence is not appropriate in his case. Although the defendant is not permitted to address the court or the jury except from the witness stand, this does not restrict any constitutional right. This Court finds that Allridge's claim is without merit.

L. The Exclusion of Juror Kathie Uzzell

Finally, Allridge argues that the trial court improperly excluded juror Kathie Uzzell ("Uzzell") from the jury in violation of Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521 (1980) and Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844 (1985) and in violation of Allridge's rights under the Sixth Amendment. The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a jury in accordance with his instruction and his oath.'" Wainwright, 469 U.S. at 424, 105 S. Ct. at 852. Determinations of juror bias depend in great degree on the trial court's assessment of demeanor and credibility, and on the court's impressions as to the juror's

state of mind. Moreover, the trial court's determination that a prospective juror could not perform his statutory function faithfully and impartially is to be accorded a presumption of correctness pursuant to 28 U.S. C. § 2254(d).

This Court finds that the trial judge's determination to excuse venire member Uzzell for bias is a factual issue which was decided after a full and fair hearing on the merits. The voir dire transcript reveals that upon her being questioned by the state whether she had any principles against the death penalty, Uzzell responded that her personal views would substantially impair her ability to follow the law if she had to assess the death penalty. After further questioning by Allridge's counsel and the trial court, she stated that she did not think that she could be fair to either side because of her internal turmoil regarding the death penalty. Citing Wainwright, the court then granted the state's challenge for cause and denied defense counsel's request to further question Uzzell.

Allridge faults the trial court for excusing venire member Uzzell without allowing him further opportunity to question her. This Court finds that the record amply supports the trial court's determination that Uzzell's personal views would substantially impair her performance as a juror. Moreover, because this determination depends heavily on the trial court's assessment of the venire member's demeanor and credibility, the trial court was clearly in the best position to make such a determination. Wicker v. McCotter, 783 F.2d 487, 493 (5th Cir.), cert. denied, 478 U.S. 1010 (1986). In view of the court's explanation and Uzzell's responses, Allridge has not shown that the trial court abused his discretion in allowing counsel to further question her. As there is support in the record for the court's finding, this Court will not substitute its judgment for that of the trial court. Id. The trial court's and Court of Criminal Appeals's determinations of bias, being fully supported in the record, are presumptively correct under 28 U.S.C. § 2254 (d), Williams v. Lynaugh, 809 F.2d 1063,

1066 (5th Cir.), cert. denied, 481 U.S. 1008 (1987), and are dispositive of Allridge's claim.

III.

After carefully considering each of Allridge's claims, this Court finds them to be without merit.

SO ORDERED.

SIGNED this 8th Day of November, 1993.

[signature of Terry R. Means]
Terry R. Means
United States District Judge

Texas Penal Code § 19 (Vernon 1994)

§ 19.02. Murder.

* * * *

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

* * * *

§ 19.03. Capital Murder.

(a) A person commits an offense if he commits murder as defined under § 19.02(b)(1) and:

* * * *

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation;

* * * *

(b) An offense under this section is a capital felony.

(c) If the jury . . . does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Code Crim. Proc. Art. 37.071 (Vernon 1989)

(b) On conclusion of the presentation of the evidence [at the sentencing phase of a capital murder trial], the court shall submit the following three issues to the jury:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> * * * *

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

28 U.S.C. § 2254
State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing:

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the

applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.)

No. 94-1522

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

RONALD KEITH ALLRIDGE,
Petitioner,

v.

WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the jury given a viable alternative to finding Allridge guilty of capital murder by the inclusion of the charge on murder, so that his conviction and death sentence are reliable?

2. Did the trial court's refusal to admit testimony that, if sentenced to life imprisonment, Allridge probably would never be paroled violate his rights under the eighth and fourteenth amendments?

3. Was Allridge entitled to an additional instruction at the punishment phase on consideration of mitigating evidence, on the basis of either the evidence he did introduce or that he had available but elected not to present?

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IN THE
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RONALD KEITH ALLRIDGE,

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v.

WAYNE SCOTT, DIRECTOR,
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INSTITUTIONAL DIVISION,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through his attorney, the

Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is published at 41 F.3d 213 (5th Cir. 1994). A copy is included at pages App. 1a-19a of the petition.

JURISDICTION

Allridge seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although he does not expressly state it, Allridge bases his claims upon the eighth and fourteenth amendments to the United States Constitution. Also implicated are the former Texas capital sentencing statute, Article 37.071(b) of the Texas Code of Criminal Procedure, and the statutes defining murder, felony murder, and capital murder, Sections 19.02(b)(1) and (2), 19.02(b)(3), and 19.03, respectively, of the Texas Penal Code.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Allridge was indicted in Tarrant County, Texas, for the murder of Carla McMillen Otto during the commission of a robbery, a capital offense. He was tried before a jury, which on November 14, 1985, found him guilty. After a separate punishment hearing, the jury on November 18,

1985, affirmatively answered the special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981), and Allridge was sentenced to death as required by law. The Court of Criminal Appeals affirmed the conviction and sentence on May 11, 1988, *Allridge v. State*, 762 S.W.2d 146 (Tex.Crim.App. 1988), and denied rehearing on September 21, 1988. This Court denied *certiorari* on February 21, 1989. *Allridge v. Texas*, 489 U.S. 1040 (1989).

On March 10, 1989, the trial court scheduled Allridge's execution for May 2, 1989. On April 27, 1989, Allridge filed an application for writ of habeas corpus in the state convicting court pursuant to Article 11.07 of the Texas Code of Criminal Procedure. On the same date, the trial court modified Allridge's execution date to August 2, 1989. On July 17, 1989, the trial court again modified the execution date to November 15, 1989. The trial court held an evidentiary hearing on October 3-5, 1989. On October 19, the trial court modified the execution date a third time to January 18, 1990. On January 2, 1990, the trial court entered a fourth order modifying the execution date to February 22, 1990. On January 4 1990, the trial court entered factual findings and legal conclusions, recommended denial of the writ, and forwarded the writ to the Court of Criminal Appeals.

The Court of Criminal Appeals stayed Allridge's execution on February 12, 1990, and set the case for consideration of Allridge's claim that trial counsel was prevented from offering mitigating evidence. On June 26, 1991, the Court of Criminal Appeals denied the writ. *Ex parte Allridge*, 820 S.W.2d 152 (Tex. Crim. App. 1991). Rehearing was denied on October 9, 1991. Allridge then requested the Court of Criminal Appeals to stay its

mandate for ninety days to enable him to file a petition for writ of *certiorari*, "if [Allridge] decides to do so." That motion was granted, but Allridge never filed a *certiorari* petition.

After the Court of Criminal Appeals issued its mandate on January 23, 1992, the trial court scheduled Allridge's execution for March 25, 1992. On March 17, 1992, Allridge filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Fort Worth Division. The court granted a stay of execution and, after briefing of the issues by the parties, heard argument on several of Allridge's contentions. After further briefing following the argument, the court issued its Memorandum Opinion and Order rejecting Allridge's claims, and entered final judgment denying habeas corpus relief. The court granted Allridge's request for certificate of probable cause to appeal. After briefing and oral argument, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of relief. *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994).

B. Statement of Facts

The facts of the crime are accurately set forth in the opinion of the Court of Criminal Appeals. *Allridge v. State*, 762 S.W.2d at 149-50.

During the punishment phase of trial, the state presented evidence from nineteen witnesses. Detective J.J. Lee testified that Allridge confessed to a number of unsolved robberies after he was taken into custody in connection with this case. Twelve witnesses testified to the details of robberies at various restaurants and convenience stores where they worked or were customers, each with a set of circumstances similar to those in the

instant robbery, and all of them robberies to which Allridge had confessed. George K. Wilson, a fingerprint expert with the Tarrant County Sheriff's Office, testified that he took Allridge's fingerprints, compared them with prints contained in a penitentiary packet, and found them to be identical. The packet indicated that Allridge had been convicted in 1977 for the offense of murder. The other four witnesses testified about another robbery-murder Allridge had admitted committing prior to the one for which he was being tried.

Allridge introduced the testimony of his father, who related the family's efforts to get psychiatric help for Allridge while he was in the Texas Department of Corrections after being convicted of another murder. He stated that the family sought help because doctors who examined Allridge prior to his murder trial said that he was schizophrenic. He also testified about abuse that Allridge suffered from other inmates. He further testified that Allridge had been a good person while growing up and had good relationships with his parents. Don Dennis, a minister who ran a church primarily for ex-convicts, testified that he had been a prison inmate for years until he accepted religion and changed his life. He felt that if he could change, anyone could, if given the chance.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Allridge has advanced no special or important reasons in this case, and none exists. The petition presents only the issue whether the court below correctly applied settled principles of law to the facts, and therefore raises no important issue of law.

II.

THE TRIAL COURT'S INSTRUCTION ON MURDER GAVE THE JURY THE OPTION OF CONVICTING ALLRIDGE OF A LESSER CRIME THAN CAPITAL MURDER.

The state's case against Allridge was predicated on the theory that only two shots had been fired during the robbery: one when the gunmen entered the restaurant, and the second, fatal shot. Allridge, on the other hand, contended that he had been startled by the sound of a third shot and that his own gun went off as a reaction to that sound. Thus, he argued, the killing had not been intentional and he could not be guilty of capital murder. Allridge requested instructions on the lesser offenses of

murder and felony murder. The court denied the request for a felony murder instruction but included one on murder. Allridge now contends that the denial of a felony murder instruction denied him due process because, had the jury believed that the killing was not intentional, it had no way to express that except by acquitting him of any crime at all. He asserts that this violates the holding of *Beck v. Alabama*, 447 U.S. 625 (1980). He also alleges that the state compounded the error by suppressing the corroborating statement of his codefendant, in violation of the Due Process Clause and the holding in *Brady v. Maryland*, 373 U.S. 83 (1963).

A. Because murder included a lower culpable mental state than capital murder, Allridge's jury had the "third option" of convicting him of a noncapital crime.

In *Beck v. Alabama*, the Court considered a state statute that prohibited a jury instruction in a capital murder trial on the lesser offense of felony murder, even if the record supported the lesser crime. Under this scheme, the jury had only two choices: it could convict of capital murder, in which case a death sentence was mandatory, or it could acquit him. The Court observed that the unavailability of an instruction on a lesser-included, non-capital offense increased the likelihood that the jury would return a verdict of guilty, not because it had found the defendant was guilty of the capital crime, but because it believed the defendant was guilty of some serious crime and felt that he should be punished rather than set free. *Beck v. Alabama*, 477 U.S. at 642-43. In such a situation,

the Court held, due process requires that that the jury be given a "third option." *Id.* at 637-38; *see also Spaziano v. Florida*, 468 U.S. 447, 454-57 (1984); *Hopper v. Evans*, 456 U.S. 605, 610 (1982).

Allridge claims that his jury was faced with this "all or nothing" situation, even though the jury had the option of finding him guilty of first-degree murder. He contends that murder and capital murder have the same culpable mental state (intentional), and that the only element that distinguishes them is that capital murder requires that the killing be in the course of committing or attempting to commit another felony. *Compare* TEX. PENAL CODE § 19.02(b)(1) (Vernon 1994) (murder) *with, id.* § 19.03 (capital murder). Because it was undisputed that Allridge was engaged in committing an aggravated robbery at the time of the killing, he asserts that finding him guilty of murder was not a viable alternative. Felony murder, on the other hand, defined as committing an act clearly dangerous to human life that causes a death while the actor is intentionally committing another felony, offered the jury the option of finding that the killing was not intentional. TEX. PENAL CODE § 19.02(b)(3) (Vernon 1994). Had this instruction been given, Allridge contends, the jury could have believed his version of events and been able to express that belief by finding him guilty of the lesser offense.

The Court addressed a similar claim in *Schad v. Arizona*, 501 U.S. 624 (1991). There, the defendant was charged with first-degree murder. He requested a charge on theft, claiming that the evidence showed at most that he merely had stolen from the victim but had not killed him. Instead, the court instructed the jury only on first- and

second-degree murder,[1] and the defendant was convicted of first-degree murder. In this Court, the defendant argued that he was entitled to a theft instruction pursuant to *Beck*. The Court disagreed. It noted that *Beck* addresses only those cases in which the jury is faced with an "all-or-nothing" decision. *Id.* at 644-48. Where the jury is given a third instruction that is supported by the evidence, due process is no longer implicated. The defendant conceded that the evidence supported a finding of second-degree murder; therefore, *Beck* did not require an additional instruction.

The defendant argued that, although a third instruction may satisfy due process, the instruction must conform with the defense's theory. Otherwise, the jury will not be able to express its agreement with the defendant's theory of the case. Disagreeing again, the Court pointed out that the concern in a *Beck* claim is not the way that the jury is instructed but the reliability of the capital murder verdict. The Court observed further:

> To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as

---

[1] The jury was instructed that first-degree murder was "murder which is the result of premeditation . . . . Murder which is committed in the attempt to commit robbery is also first degree murder." *Schad*, 501 U.S. at 629. The Arizona statute defined certain crimes as first-degree murder, then stated that "All other kinds of murder are of the second degree." *Id.* at 628, n.1.

> its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Schad, 501 U.S. at 647.

Allridge's argument fails under *Schad* because it is based on the faulty premise that the sole culpable mental state for murder is "intentional." However, the statutory definition of murder in Texas is:

> A person commits an offense if he:
>
> (1) intentionally *or knowingly* causes the death of an individual . . . .

TEX. PENAL CODE § 19.02(b)(1) (Vernon 1994) (emphasis added). That is, murder can be committed either intentionally or with the lesser mental state of "knowing." Allridge's jury was charged on murder in accordance with the statutory definition. It also was instructed on the definition of "knowing":

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware

> that his conduct is reasonably certain to cause the result.

Tr 508-09.[2]

Thus, the jury had the option of convicting Allridge of knowingly but not intentionally committing the murder. Indeed, during final argument at the guilt-innocence phase, Allridge's attorney emphasized that the key to the jury's verdict was the question of Allridge's mental state. He reviewed the evidence that he believed supported the theory that Allridge had not acted intentionally. At the conclusion of his argument, he stated:

> "I ask you to consider the lesser included charge of murder. This man is not guilty of capital murder. They have not shown an intentional killing. If you'll read the charge, you'll find that there can be a knowing offense. That is defined for you on the second page of the charge. I ask you to find the man not guilty of capital murder."

XXIX SR 461.

Allridge's jury was not limited to finding that he committed the murder intentionally, and therefore was guilty of capital murder, or acquitting him. It could have believed that he pulled the trigger as a startled reaction to the sound of another shot and still have found him guilty of

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[2] "Tr" refers to the transcript of documents filed in connection with Allridge's trial. "SR" refers to the record of Allridge's state trial, preceded by the volume number and followed by the page number. "SEH" refers to the transcription of the proceedings at the state evidentiary hearing, preceded by the volume number and followed by the page number.

knowingly committing first-degree murder. Even though the murder occurred during the commission of a robbery, if the jury found that Allridge did not have the requisite intent for capital murder, it could find him guilty of the lesser crime. Because the jury had the "third option" required by *Beck*, there was no due process violation, and *certiorari* review is not warranted.

B. There is no reasonable likelihood that the jury's verdict would have been different if it had known of the co-defendant's statement.

Allridge also contends that the state suppressed the statement of his co-defendant, Milton Ray Jarmon, which he maintains corroborated his contention that he did not have the specific intent to kill. He asserts that this was an independent due process violation, as well as exacerbating the alleged *Beck* violation.

To prevail on a *Brady* claim, a habeas petitioner bears the burden of showing that: (1) the prosecution suppressed evidence, (2) the evidence was favorable to him, and (3) the evidence was "material either to guilt or punishment." *Brady*, 373 U.S. at 87. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).[3] The purpose of the *Brady* rule

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[3] Allridge, although acknowledging that this is the proper standard, argues that the Court should apply a "probable-effect inquiry." Pet. at 22, citing to *Kyles v. Whitley*, 5 F.3d 806, 811 (5th Cir. 1993), *cert. granted*, 114 S.Ct. 1610 (1994). There is no real difference between the *Bagley*

is to assure that the accused is not denied access to favorable information known to the government but unknown to him. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Allridge can show neither suppression of the evidence by the state nor materiality.

Jarmon gave a confession after his arrest in which he stated:

> I heard a shot go off and a glass broke out. I ran and jumped the counter. I heard another shot go off, it was my gun when I went over the counter. I was going over the counter and I slipped and fell on the floor. That's when I heard another shot go off.

The prosecutors admittedly did not disclose this statement to Allridge's attorney. However, as counsel acknowledged at the state evidentiary hearing, he was aware of the statement's existence and even had discussed the case with Jarmon's attorney, although he did not ask him for a copy of the statement.[4] III SEH 172-73. As the court below noted, where it is the defendant's lack of diligence that prevents his having access to certain material, there can be no *Brady* violation. *Allridge v. Scott*, 41 F.3d at 218 n.6, *citing United States v. Ellender*, 947 F.2d 748, 757 (5th Cir. 1991). Because Allridge had other ways to gain

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standard and the "probable-effect inquiry," and the Fifth Circuit did not purport to use a different method of determining materiality. At oral argument in *Kyles*, both parties agreed that the *Bagley* standard was the appropriate measure to employ. *See Kyles v. Whitley*, No. 93-7927, Tr. Or. Arg. at 3, 26, 29.

[4] Allridge did call Jarmon as a witness at trial, but Jarmon invoked his right to silence on the advice of counsel and refused to testify. XXVIII SR 370-71

access to the statement, he cannot complain that it was suppressed by the state.[5]

Even if the state had an obligation to produce Jarmon's statement, Allridge cannot prevail on his *Brady* claim because he cannot show that the information was material to his case. The court below noted two difficulties with the statement: 1) it did not and could not say anything about Allridge's mental state at the time he fired his gun, and 2) to the extent that it *was* relevant to his mental state, it was cumulative of other evidence already before the jury. Because of this, there is no reasonable probability that the result of the trial would have been different if the statement had been available.

First, Jarmon's statement revealed nothing about Allridge's state of mind when the fatal shot was fired. Jarmon stated merely that he heard a gunshot as he fell to the floor while leaping over the counter, and that he realized that it was his gun that had discharged. After that, he heard another shot, probably the one fired by Allridge that killed Otto.[6] Jarmon's statement does not say anything about a connection between his gun's firing and Allridge's shooting Otto. This is not surprising given that Jarmon, having fallen to the floor behind the counter, had no way of knowing what was going on in the rest of the restaurant at the time. His statement does not say, because it could not, that Allridge even heard Jarmon's gun go off. Other people closer to Jarmon than Allridge was did not hear the

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[5] The court below noted that Allridge also could have sought a court order for the state to produce the statement once he was aware that it existed. *Allridge v. Scott*, 41 F.2d at 217.

[6] Even this is far from certain. A reasonable interpretation of Jarmon's statement "That's when I heard another shot go off," is that he merely was reiterating that he heard his own gun fire after he fell down.

shot, and people near Allridge did not hear another shot before Allridge fired his gun. It is not even possible to say from the statement how close in time the two shots were to each other. The best that Jarmon's statement does for Allridge is to put the fatal shot at a time after Jarmon's own gun went off. The relation between Jarmon's statement and Allridge's theory of defense is so tenuous as to divest the statement of any exculpatory value. It certainly does not qualify as material evidence.

Second, whatever value Jarmon's statement had that was relevant to Allridge's mental state was cumulative of other evidence already before the jury. Although the state proceeded on a theory that only two shots were fired in the restaurant, there was significant evidence that there were really three shots. There was no denying that one shot broke out a glass door as the robbers entered the restaurant and that another killed Otto. There also was a spent shell on the floor behind the counter, in the area where Jarmon said his gun went off. The shell was the same caliber as the gun that Jarmon was using. Some witnesses either gave statements or testified to hearing three shots. Nonetheless, the jury rejected Allridge's defense that he fired his gun as a startled reflex to the third shot. There is no reasonable probability that the addition of Jarmon's statement, which added nothing that the jury did not know already, would have changed the outcome of the trial.[7] The court of appeals correctly determined that the statement was not material evidence, and Allridge offers no reason why *certiorari* should be granted to review that conclusion.

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[7] For the same reasons, the statement was not material to the jury's determination of the first punishment issue: whether Allridge acted deliberately and with the reasonable expectation that the victim's death would result.

III.

THE JURY IN THIS CASE WAS INSTRUCTED ADEQUATELY ON THE SECOND PUNISHMENT ISSUE.

During the punishment phase, Allridge attempted to present the testimony of a former state parole commissioner to testify that, in light of Allridge's record, he would not be released on parole if he were sentenced to life imprisonment, even though he would be eligible for release after serving twenty years. The trial court ruled the evidence inadmissible because state law prohibited the jury from considering the question of parole. XXXII SR 923-87. Allridge argues that, in light of *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), the exclusion of the testimony violated his right to due process.

A. *Allridge's claim based on* Simmons v. South Carolina *is barred by the nonretroactivity rule of* Teague v. Lane.

In *Simmons*, the Court held that, when the state predicates a death sentence on the defendant's probable future dangerousness, and state law provides for a life sentence without the possibility of parole, due process requires that the defendant must be permitted, upon request, to inform the jury of his parole ineligibility. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that new constitutional rules of criminal procedure will not be announced or applied in cases on collateral review unless the rule falls within one of two narrow exceptions. The

rule that Allridge seeks is a new one that does not fit within either exception, and, thus, it cannot be applied to his case.

Allridge first argues that the rule he is invoking is not a new one. "A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Graham v. Collins*, 113 S.Ct. 892, 897 (1993), quoting *Teague*, 489 U.S. at 301 (emphasis in *Teague*). "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable minds,' *Butler v. McKellar*, 494 U.S. 407, 415 (1990), or, put differently, if 'reasonable jurists may disagree.' *Sawyer v. Smith*, 497 U.S. 227 (1990)." *Stringer v. Black*, 112 S.Ct. 1130, 1141 (1992) (Souter, J., dissenting). Not only is the rule in *Simmons* a new one, Allridge is asking that that rule be extended to cover a new class of cases.

Allridge contends that because the opinion in *Simmons* cited to and relied on *Gardner v. Florida*, 430 U.S. 349 (1970) and *Skipper v. South Carolina*, 476 U.S. 1 (1985), it was dictated by those cases and, therefore, is not a new rule. The relevant inquiry, however, is not whether there is case support for the decision the court reaches. It is a rare case that can cite to no precedent for its result. Rather, the question is "whether reasonable jurists reading the case law that existed in [1989, when Allridge's conviction became final] could have concluded that [Allridge's] sentencing was *not* constitutionally infirm." *Graham v. Collins*, 113 S.Ct. at 903. In 1989, the leading case on the subject was *California v. Ramos*, 463 U.S. 992 (1983). There, the Court had held that the determination whether to inform capital sentencing juries about such

things as parole, clemency, and the like was purely a matter of state law. Reading *Ramos*, reasonable jurists could conclude that there was no constitutional requirement that juries in capital cases be instructed about a defendant's ineligibility for parole if given a life sentence. Thus, the rule announced in *Simmons* is a new rule.

Moreover, the *Simmons* rule does not apply to a state like Texas, where there is no such punishment as a life sentence without the possibility of parole. A capital murder defendant sentenced to life imprisonment in Texas in 1985, as Allridge was, is eligible for parole after serving twenty years of his sentence. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 15(b) (Vernon 1979). The *Simmons* Court noted that:

> In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide "greater protection in [the States'] criminal justice system than the Federal Constitution requires." *[Ramos]*, 463 U.S. at 1014.

Simmons, 114 S.Ct. at 2196. Thus, not only is the rule of *Simmons* a new rule that could not be applied to Allridge's case were it applicable, the extension of the rule that

Allridge advocates would be a further violation of *Teague*'s holding.

Finally, neither of the two narrow exceptions to nonretroactivity exists. The new rule at issue would not place certain persons beyond the government's power to punish or conduct beyond its power to proscribe. Thus, it does not fall within the first *Teague* exception. *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). Nor does it constitute a "bedrock" procedural rule that is necessary to ensure fundamental fairness or accurate fact-finding. *Teague*, 489 U.S. at 307.

B. Allridge was not entitled under the Constitution to present evidence that, if sentenced to life imprisonment, his release on parole was unlikely.

Even if *Teague* did not bar review of Allridge's claim, his claim is not worthy of the grant of *certiorari*. The court of appeals correctly held that *Simmons* was limited to states where a person sentenced to life had no legal possibility for release on parole, and did not apply to Texas even if there was, in fact, no expectation of release. *Allridge v. Scott*, 41 F.3d at 221. Allridge argues that nothing in *Simmons* justifies the distinction drawn by the court below between legal ineligibility for parole and factual ineligibility.

Contrary to Allridge's argument, the Court expressly remarked that in those states where parole is available to a capital defendant sentenced to life, it is up to

the states to determine whether the jury will be informed about parole laws. *Simmons,* 114 S.Ct. at 2196; *see supra* at 18. Because Allridge would have been eligible for parole in twenty years if he had been sentenced to life, the state could prohibit the jury from receiving information about parole without violating the Due Process Clause. *Ramos* still controls in states such as Texas.[8]

C. The second punishment issue is not unconstitutionally vague.

Allridge also argues that the second punishment issue is unconstitutionally vague and imprecise. The second issue asks "whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon 1981). Allridge contends that the use of the conditional "would" in the issue, without informing the jury of the predicate condition, requires jurors to guess what it is and produces an unreliable sentencing result.

As the court below found, this is merely a variation on Allridge's complaint that he should have been able to inform the jury that he probably never would be released on parole. *Allridge v. Scott,* 41 F.3d at 222 n.13. Because there is no constitutional right to have the jury instructed in

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[8] The Court also recognized that where the state's argument that the defendant will be a future danger is based on his threat to prison inmates and staff, information about parole is less important to insuring a just sentencing result. *Simmons,* 114 S.Ct. at 2194-95 n.5. The state introduced evidence about Allridge's assaults on other inmates as part of its case on punishment to argue that he would be a danger even if confined to prison. XXXIII SR 1052.

this manner, there can be no constitutional infirmity in the wording of the statute.

IV.

THERE WAS NO IMPEDIMENT TO ALLRIDGE'S PRESENTING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE OF THE TRIAL, AND THE EVIDENCE HE DID INTRODUCE WAS NOT BEYOND THE JURY'S EFFECTIVE REACH.

At the punishment phase, Allridge introduced hearsay testimony of unspecified abuse he had suffered from other inmates at a juvenile detention facility and of a prior diagnosis of schizophrenia. He contends that there was additional evidence of emotional disturbance in his background that he could have presented, but that his attorneys made a conscious decision not to use it because it was more likely to result in affirmative answers to the punishment issues than to have the intended mitigating effect. He asserts that this was a violation of his right to due process.[9]

To the extent that Allridge is complaining that the trial court's refusal to give an instruction on consideration of mitigating evidence prevented the jury from being able to give effect to the evidence that was not introduced, the court below correctly rejected the claim. Quoting from *Delo v. Lashley*, 113 S.Ct. 1222, 1225 (1993), the court noted that "[n]othing in the Constitution obligates state

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[9] Allridge does not claim that counsel were ineffective for electing not to introduce the additional evidence.

courts to give mitigating circumstance instructions when no evidence is offered to support them." *Allridge v. Scott*, 41 F.3d at 223.

To the extent that Allridge's complaint is that the jury could not give effect to the mitigating evidence that he did present, the court of appeals correctly denied relief. The court noted that Allridge had failed to show any connection between his alleged abuse and schizophrenia and the crime that he committed. As Justice O'Connor noted in *California v. Brown*:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

479 U.S. 538, 545, (1987) (O'Connor, J., concurring). Because Allridge failed to show that his crime was attributable to his alleged mental problems and child abuse, he has not demonstrated a constitutional violation. His claim does not warrant the granting of a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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No. 94-1522

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD KEITH ALLRIDGE,

Petitioner,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT' S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Ronald Keith Allridge asks this Court to grant the writ of certiorari, and to reverse the decision of the circuit court below, for four reasons: the failure of the trial judge to instruct the jury on a crime, raised by the evidence, of which Petitioner was guilty if his defense was believed; the unconstitutional suppression of evidence helpful to his case by the prosecution; the decision of the trial judge to prevent the jury from knowing what fate awaited Petitioner should he be given a sentence of life rather than death; and the preclusion of an opportunity for Petitioner to present mitigating evidence at the punishment phase. The State's Opposition to the Petition for Certiorari ("Op. Cert.") provides scant assurance that the decision below passes constitutional muster on **any** of the cited grounds.

I. THE ILLOGICAL INSTRUCTION ON SIMPLE MURDER DID NOT EXONERATE THE DUE PROCESS VIOLATION OF DENYING A RATIONAL FELONY MURDER INSTRUCTION.

Ronald Keith Allridge was constitutionally entitled to a jury instruction on the crime of which the evidence showed he was guilty: felony murder.[1] His attorneys asked for it, his theory of defense was predicated substantially upon it, the State of Texas suppressed evidence conducive to it, and no other alternative to capital murder rationally conformed to the evidence. But the trial court refused to give a felony murder instruction. The jury -- deliberating the fate of a deadly robber whom it clearly could not acquit -- therefore convicted Allridge of capital murder.

When Allridge's attorney requested the obvious felony murder charge, the trial court stated without explanation, "Overruled." Vol. XXIX of the State Trial Court Record ("SR") 402-04. That otherwise inexplicable ruling was illuminated

[1] The evidence that Allridge's fatal shot was not intentional, but rather was a startled involuntary reflex, is recounted in his Petition for Writ of Certiorari ("Pet. Cert.") at 4, 9-10.

shortly afterward when Allridge's attorney sought a charge on the definition of the word "voluntary," and the trial court responded, "There is no evidence that the Court can remember that his act wasn't voluntary. So that's denied." SR Vol. XXIX, at 404-06.

The State of Texas does not dispute Allridge's analysis of *Beck v. Alabama*, 447 U.S. 625 (1980), and *Schad v. Arizona*, 501 U.S. 624 (1991). Instead, it responds solely with a defense of the "simple murder" instruction never previously raised: that the levels of *mens rea* for capital murder and simple murder are different ("intentional" versus "intentional or knowing"). The jury, it contends, accordingly had a satisfactory alternative to a conviction for capital murder, if it entertained doubt as to Allridge's intent.

This argument illustrates precisely the mischief to which *Schad* may be put, absent this Court's supervision. *Schad* expressly holds that, under *Beck*, due process is not satisfied by an instruction on "just any lesser included offense." 501 U.S. at 648. Here, however, what the jury heard was worse than "just any" extra instruction: it was a singularly "illogical" one,[2] since a conviction for murder effectively would have meant acquittal for armed robbery, a charge Petitioner did not seriously contest.

The key to the State's sole argument is its conspicuously conclusory statement that the jury "could have believed that [Allridge] pulled the trigger as a startled reaction to the sound of another shot and still have found him guilty of knowingly committing first-degree murder." Op. Cert. at 11-12. But this defies the plain meaning of words. Pulling a trigger as a startled involuntary reflex cannot constitute a knowing or intentional murder.[3] Such an accidental, unintended shooting may constitute

[2] The term is the Fifth Circuit's, to describe a "hypothetical verdict" of guilt for simple murder alone on this record. *See Allridge v. Scott*, 41 F.3d 213, 220 (5th Cir. 1994), Cert. Pet. at 12a.

[3] For first-degree murder, the requisite *mens rea* must attach to the *result* of the conduct. A "knowing" or "intentional" accidental shooting death is

felony murder, because the requisite *mens rea* for that crime under Texas law attaches to the underlying felony, not to the homicide. A felony murder instruction would have made sense; a simple murder instruction made none.

Ronald Allridge either intentionally shot and killed Carla Otto in the course of an aggravated robbery and was accordingly guilty of capital murder, or he accidentally shot and killed her as a startled reflex. These were the choices properly entrusted to the jury. Simple murder added nothing meaningful to the jury's deliberations: Allridge certainly did not kill Carla Otto other than in the course of a robbery, and there was not a shred of evidence, inference, or argument anywhere pertaining to the claim that he fired the fatal shot "knowingly," but not "intentionally."

The State quotes Allridge's attorney imploring the jury "to consider the lesser included charge of murder," Op. Cert. at 11 -- as though the very contortions to which the defense was put by the court's failure to give a constitutionally correct instruction somehow absolved that failure. Sadly evident in the State's very quotation, however, was that Allridge's attorney had absolutely nothing to commend the illogical murder charge, except the forlorn plea that the jury "consider" it, because it was not capital.

The simple murder instruction was an irrelevance: a caricature, rather than a vindication, of due process. If the trial court truly believed that the evidence could not support any conclusion other than that Allridge's fatal shot was intentional, then it should have dispensed with the alternative instruction altogether. But if some notion of "due process" nevertheless

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accordingly oxymoronic. *See Cook v. State*, 884 S.W.2d 485, 490-91 (Tex. Crim. App. 1994) (en banc). It is interesting that the State rests its entire due process justification upon the allegedly decisive distinction between "knowing" and "intentional," yet the highest criminal court of appeals in Texas refers to § 19.02 simple murder (the putative "alternative" in this case) as *"intentional* murder." *See id.*, emphasis added.

demanded an alternative to capital murder, then **felony murder** -- not requiring homicidal intent -- was the only rational choice.

The State's single justification for the denial of a felony murder instruction thus reduces to the arcane metaphysics of *mens rea*,[4] and a distinction without a difference in this case. The distinction between "knowingly" and "intentionally" -- even assuming the jury may have comprehended it[5] -- is irrelevant. Due process required that Allridge receive a felony murder instruction "if the evidence would permit the jury to rationally find him guilty of the lesser offense and acquit him of the greater." 41 F.3d 213, 218 (5th Cir. 1994) (Cert. Pet. at 9a).

There can be no doubt that the jurors, believing that he pulled the trigger of the shotgun unintentionally, could rationally have found Allridge guilty of felony murder, and not of capital murder. But they were denied that alternative. Instead, they were given an illogical superfluity refuted by the evidence itself.

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[4] "Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). Thus did the American Law Institute's Model Penal Code devise a "hierarchy of culpable states of mind," commonly identified as purpose, knowledge, recklessness, and negligence. *Id.* at 404; *cf.* TEX. PENAL CODE ANN. § 6.02(d) (intentional, knowing, reckless, and criminal negligence). "Perhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of 'purpose' and 'knowledge.' *Bailey*, 444 U.S. at 404 (further noting the "limited distinction between purpose and knowledge"). In light of *Beck*, perhaps the esoteric and counterintuitive nature of the distinction between "knowing" and "intentional" explains why neither the State nor any court, at any stage of these proceedings, advanced this position as a justification for denying Allridge the felony murder instruction.

[5] In Texas, the capital murder statute under which Allridge was convicted provides that capital murder comprises "murder,"-- *i.e.*, "intentionally **or** knowingly caus[ing] the death of an individual"-- and "intentionally commit[ting] the murder in the course of committing . . . robbery." Thus, compounding the confusion invariably attending *mens rea*, the jury was first instructed that capital murder may be committed "intentionally **or** knowingly," and then that it must be committed "intentionally." Allridge's attorney attempted to alleviate this additional confusion by clarifying the instruction to avoid any implication that capital murder could be knowing, rather than intentional, but this request was likewise denied. SR, Vol. XXIX, at 377-78.

That the jury **rationally** selected capital murder over acquittal -- the only remaining option -- reflects precisely the constitutional infirmity condemned by *Beck* and *Schad*.

II. THE SUPPRESSED CONFESSION OF PETITIONER'S ACCOMPLICE WAS *BRADY* MATERIAL, WHOSE DISCLOSURE WAS REQUIRED, AS RECOGNIZED BY THIS COURT IN *KYLES V. WHITLEY*.

The confession of Milton Ray Jarmon, one of the accomplices in the robbery at the Whataburger restaurant on the fateful night, recounts the sequence of gunshots, culminating in the one that ended the life of Carla Otto. There is no dispute that the State had the confession, and that it knowingly failed to provide it to defense counsel. Nor can there be reasonable doubt that it would have been helpful to the defense, since it tended to corroborate the "startled reflex" explanation of the fatal shot.

The State suggests that the confession would not have aided the defense, because it "revealed nothing about Allridge's state of mind when the fatal shot was fired." Op. Cert., at 14. But this is simply wrong: the capital offense of which Petitioner stood accused required the element of intent, and testimony that the shotgun blast closely followed the unexpected discharge of Jarmon's firearm most certainly could have been taken to support the inference of an unintentional, reflexive action by Petitioner.

Next, having already argued that there was **no** basis in the record for the jury to conclude that the killing was not intentional, the State contends that the Jarmon confession was **cumulative** to the extent that it spoke to that point.[6] Op. Cert., at 15. But surely the confession was repetitive only to the extent that the **number** of shots was in issue: in no way was it duplicative of other evidence concerning the critical matter of the shot **sequence**.

[6] The court of appeals committed the same inconsistency. *Compare* 41 F.3d 213, 217-18 (Cert. Pet., at 6a-8a), *with* 41 F.3d at 220 (Cert. Pet., at 12a-13a).

The State is quite right to acknowledge before this Court, if only at this late stage, that "there was *significant evidence* that there were really three shots." Op. Cert. at 15, emphasis added. Indeed, the evidence was more than "significant": there were two spent handgun shells and one dead body, killed by a shotgun.[7] But there was no testimony that was credible and that went to the timing, and especially to the fact that the discharge of Milton Ray Jarmon's .25 shortly preceded the fatal shotgun blast.

Yet the State proceeded to try Petitioner on the theory that there were only two shots fired, **knowing that, on this issue at least, the Jarmon confession was directly corroborative of the principal lines of defense**. With hard evidence in hand to refute its "theory," in other words, the State asked a jury to sentence Ronald Keith Allridge to die. And, in apparent reliance on evidence no better than this, the jury complied.

This Court has provided guidance, in its recent decision in *Kyles v. Whitley*, 63 U.S.L.W. 4303 (April 19, 1995), as to the proper interpretation of the line of cases concerning suppression of evidence, from *Brady v. Maryland*, 373 U.S. 83 (1963), through *United States v. Bagley*, 473 U.S. 667 (1985). *Kyles* demonstrates conclusively that the circuit court erred in applying that line of cases.

Kyles lays down four criteria to determine "materiality" of evidence whose suppression will therefore be unconstitutional under *Brady* and *Bagley*. The first two apply to the case at bar. First, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." 63 U.S.L.W. at 4307. And second, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in

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[7] Even the court of appeals described the prosecution's reliance on a two-bullet "theory" as "somewhat puzzling in light of the evidence." 41 F.3d 213, 218 n.5 (Cert. Pet. , at 7a n.5).

light of the undisclosed evidence, there would not have been enough left to convict." 63 U.S.L.W. at 4308.

This Court therefore raised significant doubt about the Fifth Circuit's conclusion that the allegedly cumulative nature of the confession defeats its qualification as *Brady* material. Petitioner need not prove that the suppressed evidence would have led to a different verdict, although here he invites the Court to agree with him that it would: it would certainly have undermined the State's own two-shot theory, on which it based its case, and it may well also have provided support for the contention that the fatal shot was an involuntary reflex rather than an intentional (much less a deliberate) act of murder.

Ultimately, as Justice Souter wrote for the Court in *Kyles*, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* It is hard to retain confidence in a capital verdict in a case such as this, when the State went to the jury with **a theory specifically contradicted by evidence in its possession, which it deliberately withheld**. Any residual confidence in the outcome is further undermined when the State, on review, defends the proposition that there was already ample evidence for the jury to conclude that its principal theory was wrong anyway, even without the material it failed to produce.

Kyles therefore reaffirms in the strongest terms the need to set aside the decision below. Since the circuit court lacked the benefit of this Court's teaching in *Kyles*, this may be an appropriate case for summary reversal, with instructions to the circuit to conduct further proceedings in light of the recent opinion of this Court.

III. THIS COURT'S OPINION IN *SIMMONS V. SOUTH CAROLINA* IS APPLICABLE AND COMPELLING HERE.

The State incorrectly argues that the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), bars Petitioner's claim under *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994). In addition, the State relies on a misinterpretation for the contention that the *Simmons* rule cannot apply in Texas death penalty cases.

A. *Simmons* Does Not Create a "New Rule" for the Purposes of Nonretroactivity under *Teague*.

Mindful of the serious mischief threatened by a broad application of the nonretroactivity rule of *Teague*,[8] the *Simmons* plurality went to great pains to illustrate that its holding was squarely rooted in "well-established precedents interpreting the Due Process Clause."[9] 114 S. Ct. 2187, 2194-5 (1994). Although the line of cases interpreting *Teague* has defined the crucial term "new rule" a number of ways, only one **clear** principle emerges: a decision that "explicitly overrules an earlier holding" is obviously a new rule. *See Butler*, 494 U.S. at 412-13. In cases similar to the instant one, however, "where the new decision is reached by an extension . . . of previous cases the inquiry will be more difficult." *Id.* Therefore, this Court has had to draw distinctions to determine whether or not cases relying on precedent announce new rules. Even when applying its broadest view of *Teague*, this Court has repeatedly characterized decisions that are "**compelled**" by existing precedents as **not** being "new rules "for purposes of nonretroactivity under *Teague*.[10] The *Simmons* plurality carefully

[8] *See Butler v. McKellar*, 494 U.S. 407, 417-33 (1990) (Brennan, J., dissenting); *Saffle v. Parks*, 494 U.S. 484, 495-515 (1990) (Brennan, J., dissenting); *Sawyer v. Smith*, 497 U.S. 227, 245-54 (1990) (Marshall, J., dissenting); *Wright v. West*, 112 S. Ct. 2482, 2496-97 (1992) (O'Connor, J., dissenting).

[9] The Court in *Kyles* similarly went out of its way to demonstrate that in reversing the opinion below, it was doing nothing more than applying *Brady* and its progeny. *See* 63 U.S.L.W. at 4303.

[10] *See, e.g., Saffle*, 494 U.S. at 491; *Sawyer*, 497 U.S. 227 at 236.

wrapped its opinion in a blanket of indicia that it was **not** announcing a "new rule."

The State claims that *California v. Ramos*, 463 U.S. 992 (1983) was controlling when Petitioner's conviction became final. Op. Cert., at 17-18. This argument is without merit. *Ramos* stands for the proposition that the relevance of parole and clemency is resolved under state law where the states "provide **greater protections** in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1013-1014. Future dangerousness as an explicit jury issue, which determined Petitioner's sentence of death, was simply not considered by the Court in *Ramos*. In light of the pre-1989 line of decisions holding that defendants have a due process right to present evidence to rebut the prosecution's reliance on contentions of future dangerousness,[11] it was not reasonable to conclude that *Ramos* controlled Petitioner's case. Consequently, *Ramos* does not render *Simmons* a new rule for *Teague* purposes. *See Stringer v. Black*, 112 S. Ct. 1130, 1140 (1992).

B. The Rationale of *Simmons* Applies to the Facts Here and Compels the Same Result.

To support its contention that *Simmons* does not apply to Petitioner's claim, the State relies **solely** on a selection from *Simmons* taken out of context. Op. Cert., at 18-20. Even a cursory reading of the opinion, however, reveals that the Court was summarizing the general holding of *Ramos*, not of *Simmons* itself. The rationale and rule of *Simmons* are set forth in the paragraph directly following the State's misleading quote:

> But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. *Because truthful*

[11] *See Simmons*, 114 S. Ct. at 2194.

> *information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.*

Simmons, 114 S. Ct. at 2196 (citation omitted; emphasis added).

The distinction between *de jure* and *de facto* parole ineligibility is irrelevant. Because Texas expressly includes future dangerousness in the sentencing phase of capital trials, *Simmons*, not *Ramos*, applies. Thus Petitioner had a due process right to present factual evidence regarding his parole ineligibility.

IV. PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF THE OPPORTUNITY TO INTRODUCE MITIGATING EVIDENCE.

As to this issue, Petitioner respectfully directs the Court to the arguments made at pages 29-30 of his original Petition. He would point out, however, that the State's only response to those arguments is an oddly inapposite citation to Justice O'Connor's concurrence in *California v. Brown*, 479 U.S. 538, 545 (1987). That language recognizes that a defendant whose criminal acts are attributable to his disadvantaged background, or mental or emotional problems, may entail less culpability "than defendants who have no such excuse." Op. Cert., at 22.

But nowhere does Justice O'Connor suggest that her list of limitations on culpability is intended to be exhaustive. Thus it simply does not follow, as the State of Texas would have it, that "[b]ecause Allridge failed to show that his crime was attributable to his alleged mental problems and child abuse, he has not demonstrated a constitutional violation." *Id.* The State errs by mistaking a delineation of **sufficient** conditions as a specification of what is **necessary**: an elementary if fatal error of logic.

CONCLUSION

For all of these reasons, as well as for those set out in the Petition herein, the writ of certiorari should issue.

Respectfully submitted,

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